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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221438
Party	Plaintiff Node Source LLC
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Date	10/09/2015
Attachments	Motion to Suspend Proceedings.pdf(51910 bytes ) Exhibit A.pdf(311470 bytes ) Exhibit B.pdf(714429 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial No. : 86/174,797  
Mark : THE NODE FIRM  
International Class : 42  
Applicant : YLD Limited  
Filed : January 24, 2014  
Published : October 7, 2014

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The Node Firm, LLC	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91221438
	:	
YLD Limited	:	
	:	
Applicant.	:	
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**OPPOSER’S MOTION UNDER 37 C.F.R. § 2.117 TO SUSPEND PROCEEDINGS**

Pursuant to 37 C.F.R. § 2.117, Opposer The Node Firm, LLC (“Opposer”), by and through its attorneys Kramer Levin Naftalis & Frankel LLP, hereby moves the Trademark Trial and Appeal Board (the “Board”) for an order suspending the proceedings in the above-captioned Opposition No. 91221438 (the “Opposition”), pending a final determination on the merits in *YLD Limited v. The Node Firm, LLC et al*, Civil Action No. 1:15-cv-00855-JPO (S.D.N.Y. Feb. 5, 2015) (the “Pending Civil Action”).

As further detailed below, the Pending Civil Action involves the same parties, and the same issues, as the Opposition, and is expected to have a bearing on the Opposition.

Whenever it comes to the attention of the Board that parties to a case pending before it are

involved in a civil action which may have a bearing on the Board's proceeding, the Board may suspend its proceeding until final determination of the civil action. 37 CFR § 2.117(a); TBMP § 510.02(a).

## **I. ARGUMENT**

### **A. Summary of Proceedings**

YLD Limited ("Applicant" or "YLD") filed the Pending Civil Action against The Node Firm, LLC (i.e. Opposer), Node Source, LLC ("NSLLC"), NodeSource, Inc. ("NSI"), and the individuals Daniel Shaw ("Shaw") and Joe McCann ("McCann") (collectively, "The Node Defendants") on February 5, 2015, exactly one day after Applicant provided its consent for an additional sixty (60) day extension of time to oppose Applicant's Application Serial No. 86/174,797 (the "Offending Application") for the mark THE NODE FIRM (as referring to Applicant, the "Offending Mark"). This Opposition was subsequently filed by Opposer against Applicant on April 6, 2015. Both the Opposition and Pending Civil Action revolve around two fundamental questions: (1) who owns rights in THE NODE FIRM name/mark; and (2) who is infringing whose intellectual property rights.

### **B. Applicant Asserts Rights in THE NODE FIRM in Pending Civil Action**

Applicant's Amended Complaint ("Amended Complaint", attached hereto as Exhibit A) filed in the Pending Civil Action asserts that Applicant owns "all right in and to 'The Node Firm' trade name, along with the goodwill associated with same" by way of assignment from Mr. Nuno Job ("Job"). Amended Complaint ¶ 35. Job is stated to be Applicant's founder, who allegedly, in late November 2011, "began advertising and offering training, consulting and support services to third parties for Node.js programming under the trade name 'The Node Firm.'" Amended Complaint ¶ 28.

Applicant's Amended Complaint asserts federal claims of trademark infringement under 15 U.S.C. § 1125(a), federal claims of copyright infringement under various sections of the Copyright Act, and certain state law claims against The Node Defendants.

Applicant's federal trademark and copyright claims arise out of The Node Defendants' alleged infringing use of THE NODE FIRM mark, and The Node Defendants' alleged reproduction, display and distribution (directly or by inducement of others) of certain training materials in connection with THE NODE FIRM mark. Amended Complaint Counts I-V. Applicant alleges that the activities of each of Opposer, NSLLC and NSI that constitute federal trademark and copyright infringement were "at the direction and under the control of Shaw and McCann." Amended Complaint ¶¶ 48, 50-52, 54-55, 69-74.

Applicant's state law claims are for common law unfair competition, unjust enrichment and fraudulent conveyance. Amended Complaint Counts VI-X. The unfair competition claim is based on The Node Defendants' "use of 'The Node Firm' name to offer support, training and consulting services in connection with Node.js." Amended Complaint ¶ 137. Applicant's unjust enrichment claim alleges that NSLLC and NSI "have also benefitted from use of 'The Node Firm' name and the goodwill associated therewith as they have taken over the business of [Opposer] and are mere continuations of same and benefit from the reputation and goodwill associated with 'The Node Firm' brand." Amended Complaint ¶ 151. Applicant's fraudulent conveyance claims allege wrongful transfers of assets from Opposer to NSLLC, and from NSLLC to NSI, on the basis that "[NSLLC] is operating as a mere continuation of [TNF II]" and "[NSI] is operating as a mere continuation of [NSLLC]." Amended Complaint ¶¶ 158, 181. In connection with these claims, Applicant asserts that Opposer acted "at the instruction of Shaw and McCann"; that "Shaw and McCann still retained

control over the property and assets that were transferred from [Opposer] to [NSLLC], by virtue of their control over [NSLLC]”; and that “[NSI] is deemed to be the same entity as [NSLLC].”

See Amended Complaint ¶¶ 147, 163, 184.

C. Opposer Asserts Rights in THE NODE FIRM in Opposition

As stated in Opposer’s Notice of Opposition (“Notice”), and as further detailed in the Memorandum of Opposer The Node Firm, LLC to Supplement Its Opposition to Applicant YLD Limited’s Motion to Dismiss being filed concurrently with the filing of this Motion, Opposer contends that it is the owner of common law rights in the name and mark THE NODE FIRM (as referring to Opposer, “Opposer’s Mark”), which such name and mark has been used by or on behalf of Opposer since at least as early as November 28, 2011 in connection with services including computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; and creating of computer programs (“Opposer’s Services”). Opposer contends that all services referenced in the Offending Application performed by Job under THE NODE FIRM name and mark were performed on behalf of Opposer or a predecessor thereof. Notice ¶ 17.

Opposer’s Notice alleges that the Offending Application is void *ab initio*; that Applicant committed fraud on the U.S. Patent & Trademark Office; that the Offending Mark is descriptive and that Applicant has not established the requisite secondary meaning to support its registration thereof; that the Offending Mark has been abandoned by Applicant; that use of the Offending Mark by Applicant falsely suggests a connection with Opposer; and that any use of the Offending Mark by Applicant is likely to cause confusion with Opposer’s Mark.

D. Opposer's Counterclaims and Third Party Claims in Pending Civil Action Arise Out of Same Facts as Opposition

The Node Defendants' Answer, Affirmative Defenses, Counterclaims, and Third Party Claims ("Answer", attached hereto as Exhibit B) in response to Applicant's Amended Complaint denies that YLD has established ownership rights in "The Node Firm" trade name. Answer ¶¶ 34-35. The Node Defendants assert, among other defenses, that The Node Defendants have not infringed any valid and enforceable trademark rights owned by Applicant; that any rights that Applicant may have had in the name/mark THE NODE FIRM have been abandoned; and that any alleged assignment of the name/mark THE NODE FIRM, or any trademark application therefor, from Job to Applicant was invalid because Job never possessed any valid rights in the name/mark THE NODE FIRM, or any trademark application therefor. Answer ¶¶ 226, 229, 230. The Node Defendants also filed counterclaims against Applicant, and third party claims against Job to seek, *inter alia*, a declaration of noninfringement of alleged trademark rights; a declaration of trademark invalidity; and a ruling that Applicant's use of the Offending Mark constitutes False Designation of Origin under 15 U.S.C. § 1125. Answer ¶¶ 299-309, 318-323. The facts submitted in support of The Node Defendants' counterclaims summarized above, as well as in support of The Node Defendants' third party claims against Job for trespass to chattel, conversion and breach of fiduciary duty, substantially overlap with the facts relevant to the Opposition. *See* Answer ¶¶ 257-294.

E. The Board Has Discretion to Suspend Prior to Deciding Dispositive Motion

When there is a pending motion for summary judgment before the Board, it is within the Board's discretion to elect to suspend the proceeding without first deciding the potentially dispositive motion. TBMP § 510.02(a). While the TBMP permits the Board to decide a potentially dispositive motion prior to considering the question of suspension, "the

purpose of this rule is to prevent a party served with a potentially dispositive motion from escaping the motion by filing a civil action and then moving to suspend before the Board has decided the potentially dispositive motion.” TBMP § 510.02(a). The circumstances presented here are clearly distinguishable from the circumstances for which suspension might not be appropriate. Indeed, it is cases such as this that readily evidence why suspension would be advisable.

F. Suspension Serves Judicial Integrity and Economy

As detailed above, the same issues presented in the Opposition are also presented for adjudication in the Pending Civil Action. The Pending Civil Action will address issues of ownership and rights in THE NODE FIRM name/mark, which such issues are also the focus of the Opposition. Because this Opposition and the Pending Civil Action involve several material issues in common, the decision of the federal district court is likely to be binding upon the Board, while the decision of the Board may not be binding upon the court.<sup>1</sup> TBMP § 510.02(a). Moreover, the significant complexities presented by the facts underlying both the Opposition and the Pending Civil Action warrant full consideration, to the extent that any non-trademark claims alleged by either party in the Pending Civil Action could have an impact on the trademark claims alleged in this Opposition. Judicial integrity, and judicial economy, are thus also served by suspension of the Opposition to permit a full hearing of all issues raised to the District Court.

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<sup>1</sup> While Opposer acknowledges the Supreme Court’s recent holding in *B&B Hardware, Inc. v Hargis Industries, Inc.*, No. 13-352, 575 U.S. \_\_\_, 2015 WL 1291915 (Mar. 24, 2015) regarding the potential precedential value of Board decisions in federal district court cases, the facts and circumstances of the instant matter render it outside the ruling and reasoning of that decision.

## **II. CONCLUSION**

For each of the foregoing reasons, Opposer respectfully requests that the Board suspend the Opposition pending a final determination on the merits in the Pending Civil Action.

Respectfully submitted,

Dated: New York, NY  
October 9, 2015

KRAMER LEVIN NAFTALIS & FRANKEL LLP  
Attorneys for Opposer The Node Firm, LLC



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 9, 2015, I caused one true and correct copy of the foregoing Opposer's Motion Under 37 C.F.R. § 2.117 to Suspend Proceedings to be served by first class mail upon Applicant YLD Limited by causing a true and correct copy thereof to be deposited in the United States mail, postage prepaid, addressed to counsel for Applicant as follows:

Sarah M. Matz  
Adelman Matz P.C.  
1173A Second Avenue, Suite 153  
New York, NY 10065

A handwritten signature in black ink, appearing to read 'Erica D. Klein', written over a horizontal line.

Erica D. Klein

# EXHIBIT A

ADELMAN MATZ, P.C.  
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Phone: (646) 650-2207

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
X-----X  
YLD LIMITED,

Case No.: 15cv00855 (JPO)

Plaintiff,

v.

**AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL**

THE NODE FIRM, LLC, NODE SOURCE, LLC,  
NODESOURCE INC., DANIEL SHAW, and JOE  
MCCANN,

Defendants.

X-----X

Plaintiff YLD Limited (“YLD” or “Plaintiff”) by its attorneys, Adelman Matz, P.C., for its complaint against The Node Firm, LLC (“TNF LLC”), Node Source, LLC (“Node Source”), NodeSource, Inc., (“NS Inc.”), Daniel Shaw (“Shaw”), and Joe McCann (“McCann”) (collectively referred to herein as the “Defendants”) alleges as follows:

**NATURE OF THE CASE**

1. This is an action by Plaintiff for copyright infringement, contributory copyright infringement, vicarious copyright infringement, inducement of copyright infringement under the Copyright Act of 1976, 17 U.S.C. §101 *et seq.*, trademark infringement, unfair competition, unjust enrichment and fraudulent transfer, based on the knowing and willful conduct by all the Defendants infringing YLD’s copyrights in its Node.js platform training materials (the “Training Materials”), infringing YLD’s trademark rights in and to “The Node Firm” trade name, engaging in acts that constitute

unfair competition, unjustly retaining the benefit of the use of YLD's trade name "The Node Firm" without compensation to YLD and fraudulently transferring and conveying assets with the intent to hinder, delay and defraud YLD.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338(a) and (b), and pursuant to the principles of supplemental jurisdiction under 28 U.S.C. § 1367.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) and (b) because a substantial part of the events giving rise to this claim occurred in this district, all of the Defendants conduct substantial business within the State of New York, Defendants transact business within the state to supply services in the state, have committed tortious acts within the state and/or committed tortious acts without the state and Defendants regularly do business within the state, solicit business within the state, derive substantial revenue from services rendered in the state, and have infringed Plaintiff's intellectual property rights, including YLD's copyright and trademark within the State of New York as described herein, and at least one of the Defendants is a resident of the State of New York.

4. In addition, upon information and belief, Defendants TNF LLC and Node Source have employees and agents within the State of New York and transact business within the state through their officers, directors, members, managers, employees and/or agents.

5. Venue is also proper in this district pursuant to 28 U.S.C. §1400(a) and (b) as Defendants and their officers, directors, members, managers, employees and agents

reside and are found in this district and as the Defendants have committed acts of infringement in this district.

### **NATURE OF THE PARTIES**

6. YLD Limited is a foreign corporation duly formed and existing under the laws of the United Kingdom, with its principal place of business at 32-38 Scrutton Street, EC2A 4RQ, London, England.

7. YLD Limited is a privately held corporation.

8. Upon information and belief, Defendant TNF LLC is a limited liability company duly formed and existing under the laws of the State of Texas.

9. Upon information and belief, TNF LLC has no central office and has members, managers, employees, agents and/or team members in places all around the world, including in New York State.

10. Upon information and belief, Defendant Node Source is a limited liability company duly formed and existing under the laws of the State of Texas.

11. Upon information and belief, Node Source has no central office and has members, managers, employees, agents and/or team members in places all around the world, including in New York State.

12. Upon information and belief NS Inc., is a corporation duly formed and existing under the laws of the State of Delaware.

13. Upon information and belief, NS Inc., has no central office and has officers, directors, officers, managers, employees, agents and/or team members in places all around the world, including in New York State.

14. Upon information and belief, Defendant Joe McCann is an individual who resides in the State of New York.

15. Upon information and belief, McCann owns at least one third (33.33%) of TNF LLC and Node Source, and, among other things serves as a member/manager, Business Director and/or CEO of TNF LLC and Node Source, and as such has control over TNF LLC and Node Source's operations and decisions.

16. Upon information and belief, McCann owns at least one third (33.33%) of the shares of NS Inc., and is a director and CEO of NS Inc., and as such has control over NS Inc.'s operations and decisions.

17. Upon information and belief, Defendant Daniel Shaw is an individual who currently resides in the State of California.

18. Upon information and belief, Shaw owns one third (33.33%) of TNF LLC and Node Source and is the Managing Director and/or CEO of TNF LLC and Node Source, and as such has control over TNF LLC and Node Source's operations and decisions.

19. Upon information and belief, Shaw owns at least one third (33.33%) of the shares of NS Inc., and is a director and President of NS Inc., and as such has control over NS Inc.'s operations and decisions.

20. Upon information and belief, each of the Defendants regularly transacts business within the State of New York in that they have entered into contracts in the State of New York to supply services, have committed tortious acts and the acts complained of herein in the State of New York, and have caused injury to Plaintiff within New York State. Additionally, upon information and belief Defendants regularly solicit business in and derive substantial revenue from the State of New York.

## FACTUAL BACKGROUND

### A. Plaintiff's Ownership of the Training Materials

21. Upon information and belief, Nodejitsu, Inc. (“Nodejitsu”) is a corporation duly formed and existing under the laws of the state of Delaware with its principal place of business at 110 5th Avenue, 5th Floor, New York, NY 10011, and is a well-known provider of infrastructure, platform services, and software for enterprise and public cloud users that help its clients develop and deploy applications written for Node.js.

22. In late 2011, Nuno Job, an individual working for and under contract with Nodejitsu, saw a lack of qualified companies providing consulting services to third parties who were beginning to program in Node.js.

23. Upon information and belief, Nodejitsu believed it would benefit directly from creating these materials by charging licensing fees to consulting service providers who used these training materials. Nodejitsu believed that having its materials strategically placed in front of potential customers through the consulting service providers, would in turn drive business leads to Nodejitsu.

24. In late 2011 and early 2012, Nodejitsu created a set of Node.js platform training materials. Specifically, Nodejitsu created, selected, arranged, and edited the text, computer program code and artwork for these training materials. Nodejitsu registered the training materials with the United States Copyright Office, attaining a U.S. Copyright Registration No. TX 7-87-084 with an effective date of January 27, 2014 (the “Training Materials”).

25. Nodejitsu, by way of agreement, written assignments and/or work for hire, was the copyright owner of exclusive rights with respect to the Training Materials.

26. By virtue of written agreements, YLD has acquired the right, title and interest in and to the copyright in the Training Materials, as well as all rights to income from the Training Materials and the right to prosecute all causes of action for past, present or future infringement thereof.

27. Under the Copyright Act, YLD has the exclusive rights, among other things “to do and to authorize” reproduction of the Training Materials in copies, preparation of derivative works based upon the Training Materials, distribution of copies of the Training Materials, and the display of the Training Materials.

**B. Plaintiff’s Ownership of THE NODE FIRM Mark**

28. In late November of 2011, YLD’s founder Mr. Nuno Job (“Job”) began advertising and offering training, consulting and support services to third parties for Node.js programming, under the trade name “The Node Firm.”

29. On or about November 28, 2011, Job registered the domain name thenodefirm.com, registered to receive email @thenodefirm.com using the Google Apps service and created a website for The Node Firm.

30. In the beginning of 2012, social media accounts, including Twitter, were registered by Job under the handle “TheNodeFirm.”

31. Thereafter, in 2011 and 2012, YLD’s founder Job advertised and offered training and consulting services under “The Node Firm” name. In addition, during this time frame Job invested significant time in pitching new clients, providing training services under “The Node Firm” name, developing client leads and new clients interested in training support and technology services branded as “The Node Firm.” Job also promoted “The Node Firm” brand through speaking engagements, sponsorship opportunities, attendance



at conferences and other networking opportunities. One of the customer leads Job spent significant time developing as a potential customer for “The Node Firm” branded services, was PayPal.

32. Among others, Job offered training services utilizing the Training Materials through an oral, non-exclusive, non-transferrable license under which Job would be allowed to use the Training Materials for Node.js training events and presentations and in exchange would capture business leads to drive business to the Nodejitsu platform. The license was terminable at will by Nodejitsu.

33. Job invested substantial time, resources and hard work to develop “The Node Firm” brand and to ensure that services offered under “The Node Firm” name were of high quality and as such has established substantial goodwill in “The Node Firm” name in New York, around the country and the world.

34. Through Job’s efforts and use of “The Node Firm” trade name, as well as its advertising, offering and providing services in interstate commerce, and other use, Job established ownership rights in “The Node Firm” trade name and the exclusive right to use “The Node Firm” name in interstate commerce in connection with the provisioning of consulting and training services.

35. Thereafter, all right in and to “The Node Firm” trade name, along with the goodwill associated with same and the right to sue for all past infringement, was validly assigned by Job to YLD, so that YLD could continue providing consulting services under The Node Firm name.

**C. Defendants' Infringing Acts**

36. Upon information and belief, in late 2011, Defendant Shaw was aware that Job was offering and providing consulting services under "The Node Firm" name and that Nodejitsu owned the copyright in and to all of the Training Materials and that said materials were used by Job providing services as "The Node Firm" through a non-exclusive, non-transferrable oral license agreement.

37. Upon information and belief, in 2012, Defendant McCann was aware that Job was offering and providing consulting services under "The Node Firm" name and that Nodejitsu owned the copyright in and to all of the Training Materials and that said materials were used by Job providing services as "The Node Firm" through a non-exclusive, non-transferrable oral license agreement.

38. Upon information and belief, in early 2013, Defendants Shaw, McCann and an individual by the name of Isaac Schlueter decided to form a new company that would offer the same training, consulting and support services that were being offered by Job for the Node.js platform.

39. Upon information and belief, Defendants Shaw and McCann wanted to offer these services through a new company that would be owned by them, but wanted to use "The Node Firm" trade name so that they could utilize the good will, client trust, and business already associated with "The Node Firm" trade name, which had been created by Job.

40. Essentially, upon information and belief Defendants Shaw and McCann wanted to take over the existing consulting, training and support business that had been started, cultivated and substantially developed by Job under the name "The Node Firm."

41. Job communicated to Defendants Shaw and McCann that he was willing to consider allowing Defendants Shaw and McCann's new company to use "The Node Firm" trade name, provided that he was properly compensated for use of the name, and that Job's other conditions of a license were satisfied.

42. In addition, on or around February 5, 2013, directly prior to the formation of their new Company, Shaw and McCann were advised in writing by Nodejitsu, who owned the copyrights in and to the Training Materials at that time, that they needed a formal written agreement to use the Training Materials. Among other things, any agreement would have needed to include terms for the license of the Training Materials from Nodejitsu, it would also have needed to include compensation to Nodejitsu in the form of formalization of lead generation system to Nodejitsu, it would have needed to include preferred pricing and would need to address certain liability issues.

43. In emails exchanged between the parties in February of 2013, Shaw and McCann acknowledged Nodejitsu's ownership of the Training Materials and that they needed to license any use of the Training Materials from Nodejitsu for the new company they planned to form.

44. Upon information and belief, on or about February 28, 2013, Shaw, McCann and Schlueter started a limited liability company under the name The Node Firm, LLC (defined herein as "TNF LLC").

45. No license for use of the Training Materials was ever obtained by Shaw, McCann, or TNF LLC.

46. No license for use of the name "The Node Firm" was ever obtained by Shaw, McCann, or the company they formed The Node Firm LLC (TNF LLC).

47. Upon information and belief, beginning on February 28, 2013, Shaw, McCann, and TNF LLC, began offering, advertising and providing consulting, support and training services using the name “The Node Firm” without permission or authorization from Job.

48. Upon information and belief, beginning on February 28, 2013, Shaw, McCann, and/or TNF LLC (under the direction and control of Shaw and McCann) have prepared unauthorized derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

49. Upon information and belief, a qualitatively and quantitatively significant portion of the unauthorized derivatives was appropriated from and/or based on the Training Materials owned by YLD and is substantially similar to the Training Materials.

50. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw and McCann, have offered trainings that utilize and display the Training Materials and/or unauthorized derivatives thereof to third parties including but not limited to PayPal, Netflix, Pearson Education and Symantec, without authorization or permission from Nodejitsu or YLD.

51. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw and McCann, have distributed, transmitted and displayed the Training Materials and/or unauthorized derivatives thereof for profit to third parties consumers who participated in their virtual training sessions and their customers, including but not limited to Pearson Education, PayPal, Netflix, and Symantec, without authorization or permission from Nodejitsu or YLD. Instances where TNF LLC, Shaw and McCann have transmitted the Training Materials and/or unauthorized

derivatives thereof via the internet, electronic mail, and/or virtual training sessions constitute unauthorized “reproductions” of, distribution of, and unauthorized display of said Training Materials and/or unauthorized derivatives thereof.

52. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw and McCann, issued licenses to third parties for use of the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

53. Upon information and belief the issuances of licenses to third parties for use of the Training Materials and/or unauthorized derivatives thereof, constitute violations of YLD’s exclusive right to authorize (i) reproductions; (ii) preparation of derivative works; (iii) distribution of copies; and (iv) display, of the Training Materials and/or unauthorized derivatives thereof.

54. By way of example, upon information and belief, TNF LLC, at the direction and under the control of Shaw and McCann, licensed the Training Materials to PayPal and Pearson Education, among others, for those entities to train their employees and contractors, in exchange for over one million dollars (\$1,000,000).

55. Upon information and belief, beginning on February 28, 2013, TNF LLC, at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced, third party individuals including consumers who participated in their training sessions and their customers such as PayPal and Pearson Education, to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

56. Upon information and belief, between February 28, 2013 and the present, TNF LLC, Shaw and McCann derived substantial profits from their exploitation and infringing use of the Training Materials.

57. Upon information and belief, between February 28, 2013 and the present, TNF LLC, Shaw and McCann derived substantial profits from their exploitation and use of “The Node Firm” trade name and the goodwill associated therewith.

58. Upon information and belief, by way of just one example, based on the reputation of “The Node Firm” brand, PayPal and Pearson Education, believing that TNF LLC was associated with “The Node Firm” brand, entered into contracts with TNF LLC wherein TNF LLC would provide training services and/or license for use of the Training Materials in exchange for over one million dollars (\$1,000,000).

59. Between February 2013 and February 2014, Job advised Defendants orally and in writing, on behalf of himself, YLD and Nodejitsu, that they were not permitted to use “The Node Firm” trade name or the Training Materials without permission from Job and Nodejitsu (at that time the owner of the Training Materials), respectively.

60. On or about February 4, 2014, Plaintiff sent Defendants a cease and desist letter demanding that Defendants cease and desist from use of the Training Materials and “The Node Firm” trade name.

61. Upon information and belief, on or about February 25, 2014, after Shaw, McCann and TNF LLC, were aware of Plaintiff’s claims of copyright and trademark infringement and Plaintiff’s demand, Shaw and McCann formed a new company under the name Node Source LLC.

62. Upon information and belief, it was the intent of Defendants that Node Source absorb and continue the business of TNF LLC.

63. Upon information and belief, Node Source is engaged in the same business as TNF LLC, in that, like TNF LLC, Node Source is engaged in the business of providing consulting, training and support services for Node.js programmers using the Training Materials and unauthorized derivatives thereof.

64. Upon information and belief, Node Source has continued to use substantially the same management and personnel, structure, assets, property, customer lists, and business format and general business operations as that of TNF LLC.

65. Upon information and belief, TNF LLC transferred all of its assets including but not limited to, property, customer lists, capital, cash, contracts, receivables, and business operations to Node Source, without adequate, fair or any compensation therefor.

66. Upon information and belief, Node Source is operating as a mere continuation of TNF LLC.

67. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source caused TNF LLC to become insolvent and/or with unreasonably small capital and/or without an ability to pay the debts previously claimed by Plaintiff.

68. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source without fair consideration, shortly after Plaintiff's cease and desist letter including a demand for compensation, was intended to hinder, delay and/or defraud YLD.

69. Upon information and belief, since its formation in February of 2014, Node Source, at the direction and under the control of Shaw and McCann, has also reproduced,

distributed, displayed, licensed and otherwise exploited the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

70. Additionally, upon information and belief, since its formation in February of 2014, at the direction and under the control of Shaw and McCann, Node Source has created derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

71. Upon information and belief, since its inception, Node Source, at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced third parties to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

72. Upon information and belief, since its inception NS Inc., at the direction and under the control of Shaw and McCann, has also reproduced, distributed, displayed, licensed and otherwise exploited the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

73. Additionally, upon information and belief, since its inception, NS Inc., at the direction and under the control of Shaw and McCann, has created derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

74. Upon information and belief, since its inception, NS Inc., at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced third parties to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.



75. Upon information and belief, through the present Defendants continue to use and exploit the Training Materials and “The Node Firm” trade name for their own commercial purposes without authorization or permission from YLD.

76. Upon information and belief, Defendants’ infringing acts are willful and deliberate and committed with prior notice of Nodejitsu’s and subsequently YLD’s ownership of the copyright in and to the Training Materials.

77. Upon information and belief, Defendants’ infringing acts are willful and deliberate and committed with prior notice of YLD’s ownership rights in and to “The Node Firm” trade name.

78. Upon information and belief, as a result of Defendants’ unlawful actions, Plaintiff has been damaged and has suffered, and continues to suffer, irreparable injury for which it has no adequate remedy at law. An injunction is necessary to ensure that Defendants permanently cease any further use of the Training Materials and “The Node Firm” name.

## **COUNT I**

### **COPYRIGHT INFRINGEMENT OF THE TRAINING MATERIALS** **(Against All Defendants)**

79. Plaintiff repeats and re-alleges each and every allegation of paragraphs 1 through 78 as above as if fully set forth herein.

80. YLD is the owner of a valid copyright in and to the Training Materials.

81. Upon information and belief, Defendants have infringed YLD’s exclusive rights in and to its copyrights by *inter alia*, reproducing, distributing, displaying, licensing and otherwise exploiting the Training Materials.

82. Upon information and belief, Defendants have further infringed on YLD's copyright in and to the Training Materials by authorizing third parties to and preparing, distributing, licensing, displaying and otherwise exploiting unauthorized derivatives of the Training Materials.

83. Neither Nodejitsu nor YLD authorized any of the Defendants to copy, reproduce, display, distribute, license, or otherwise exploit the Training Materials or any derivative thereof.

84. Additionally, neither YLD nor Nodejitsu authorized any of the Defendants to make derivative works of the Training Materials.

85. Upon information and belief, Defendants did not obtain any permission, consent or license for the use, distribution, copying, reproduction, display or exploitation of the Training Materials nor did they obtain permission, consent or license for the preparation of derivative works of the Training Materials.

86. Upon information and belief, Defendants' infringing acts alleged herein were willful, deliberate, and committed with prior notice and knowledge of the copyright in and to the Training Materials.

87. Upon information and belief, Plaintiff has been harmed by the continued infringement by Defendants of YLD's copyright in and to the Training Materials.

88. Upon information and belief, Defendants are likely to continue infringing YLD's copyright in and to the Training Materials unless they are enjoined from further infringement.

89. Upon information and belief, the infringing acts of Defendants have been, are and, if continued hereafter, will continue to be committed willfully.

90. As a direct and proximate result of their actions, Defendants are liable to the YLD for willful copyright infringement under 17 U.S.C. § 501, in violation of YLD's exclusive rights under 17 U.S.C. § 106.

91. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained but to be determined at trial.

92. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

93. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

94. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and as such, YLD is also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under the Copyright Act.

95. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

## **COUNT II**

### **INDUCEMENT OF COPYRIGHT INFRINGEMENT OF THE TRAINING MATERIALS (Against All Defendants)**

96. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 95 above with the same force and effect as if set forth fully herein.

97. Upon information and belief, Defendants' clients have engaged in, including but not limited to, the unauthorized reproduction, display, and distribution of the

copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

98. Upon information and belief, Each one of Defendants' clients' infringing acts has been encouraged and made possible by Defendants authorization and encouragement of those infringing acts, whose intent is to promote and encourage the unlawful reproduction, display, distribution and exploitation of the copyrighted Training Materials and/or unauthorized derivatives thereof.

99. As a direct and proximate result of their actions, Defendants are liable to the YLD for inducing the infringing acts of their clients, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

100. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

101. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

102. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under the Copyright Act.

103. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

**COUNT III**

**CONTRIBUTORY COPYRIGHT INFRINGEMENT**  
**OF THE TRAINING MATERIALS**  
**(Against All Defendants)**

104. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 103 above with the same force and effect as if set forth fully herein.

105. Upon information and belief, Defendants' clients have engaged in, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

106. Upon information and belief, Defendants had actual and constructive knowledge of their clients' infringing activity and materially contributed to that activity by licensing the Training Materials, and/or unauthorized derivatives thereof, to said third parties and approving and encouraging their Clients to display, reproduce and distribute the Training Materials to employees within those organizations, thus urging and contributing to infringing conduct.

107. Upon information and belief, at the time they began using the materials in 2013, Defendants were aware of Nodejitsu's ownership of the Training Materials prior to the start of any of the above mentioned acts, and despite requests, have refused to take any action to halt the infringing conduct.

108. As a direct and proximate result of their actions, Defendants are liable to the YLD for contributorily infringing YLD's copyright, in violation of Sections 106 and

501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

109. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

110. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

111. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under copyright.

112. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

#### **COUNT IV**

#### **VICARIOUS COPYRIGHT INFRINGEMENT OF THE TRAINING MATERIALS (Against All Defendants)**

113. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 112 above with the same force and effect as if set forth fully herein.

114. Upon information and belief, Defendants' clients have engaged in various infringing acts, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

115. Upon information and belief, Defendants had the legal right and ability to supervise and control the infringing activity that occurred through their services, including but not limited to by issuing licenses, authorizations to and/or giving their clients permission to engage in the infringing activity.

116. Upon information and belief, by promoting TNF LLC and Node Source's ability to provide Node.js training seminars to its clients and by using and disseminating the copyrighted Training Materials in those seminars and licensing the Training Materials to their Clients for further display and reproduction within those organizations, Defendants are intimately involved in supervising and controlling the infringing activity.

117. Upon information and belief, Defendants nevertheless refused to exercise any control over the illegal reproduction, display, and distribution of the copyrighted Training Materials, and as a direct and proximate result of such failure, Defendants' clients have infringed the copyrighted Training Materials.

118. Upon information and belief, Defendants derived a substantial financial benefit from those infringements of the copyrighted Training Materials.

119. Upon information and belief, TNF LLC and Node Source were paid by their clients for the training services they provided, which were based on the unauthorized use of the copyrighted Training Materials.

120. Upon information and belief, Shaw and McCann also derived substantial benefit from those infringements by distributing the profits from their infringing activities to themselves.

121. Upon information and belief, Defendants also derived substantial benefit from licensing the Training Materials and/or unauthorized derivatives thereof to their clients for the purpose of their clients running their own internal training sessions.

122. As a direct and proximate result of their actions, Defendants are liable to the YLD for vicariously infringing YLD's copyright, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

123. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

124. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

125. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under copyright.

126. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

## **COUNT V**

### **TRADEMARK INFRINGEMENT IN VIOLATION OF 15 U.S.C. §1125(a)** **(Against All Defendants)**

127. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 126 above with the same force and effect as if set forth fully herein.



128. Through Job's efforts and use of "The Node Firm" trade name, he established ownership rights in "The Node Firm" name and the exclusive right to use "The Node Firm" name in interstate commerce in connection with the provisioning of consulting services, which was assigned to YLD, along with, *inter alia*, the goodwill associated therewith.

129. Defendants' use of "The Node Firm" trade name in connection with the provisioning of support, consulting and training services constitutes a false designation of origin and/or a false or misleading description and representation of fact which is likely to cause confusion and mistake, and is likely to deceive consumers as to the affiliation, connection and/or association of Defendants with YLD and is likely to mislead consumers to believe that the Defendants' services are sponsored, approved or somehow associated with YLD.

130. By reason of the foregoing, the trade and public are likely to be and will continue to be confused, misled, or deceived, and YLD has, is now, and will continue to suffer irreparable injury to its goodwill and business reputation for which it has no adequate remedy at law.

131. Upon information and belief, Defendants have intentionally and knowingly adopted and used a trade name that is likely to cause confusion in the marketplace as to the source, origin, or sponsorship of the goods offered for sale and sold by the Defendants.

132. By virtue of the foregoing, Defendants' acts are in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

133. Defendant's acts are causing and continue to cause YLD irreparable harm in the nature of loss of control over its reputation and loss of substantial consumer goodwill.

The irreparable harm to YLD will continue, without any adequate remedy at law, unless and until Defendants' unlawful conduct is enjoined by this Court.

134. Upon information and belief, Defendants are using "The Node Firm" trade name, willfully and with knowledge that they do not have the right to use said name, and with the intent to unfairly compete with YLD, and benefit from the goodwill associated with "The Node Firm" name.

135. Defendants' conduct has caused, and is likely to continue causing, substantial injury to the public and to YLD, and YLD is entitled to injunctive relief and to recover Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(a), 1116 and 1117.

## **COUNT VI**

### **COMMON LAW UNFAIR COMPETITION** **(Against All Defendants)**

136. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -135 above as though fully set forth herein.

137. Defendants' use of "The Node Firm" name to offer support, training and consulting services in connection with Node.js, without the authorization or consent of YLD is likely to cause confusion and mistake and to deceive consumers as to the source, origin, sponsorship or affiliation of Defendants and constitutes trade name and trademark infringement, unfair competition and misappropriation of YLD's goodwill and reputation.

138. Upon information and belief, Defendants adopted and used "The Node Firm" name as a trade name and trademark with the intent to trade off of the goodwill and reputation of "The Node Firm" name, which is owned by YLD.

139. Upon information and belief, Defendants have infringed YLD's mark "The Node Firm" as alleged herein with the intent to deceive the public into believing that services offered by Defendants are made by, approved by, sponsored by or affiliated with, YLD.

140. Upon information and belief, Defendants' acts as alleged herein were committed with the intent to pass off and palm off Defendants' services as the services of Job (now YLD), and with the intent to deceive and defraud the public.

141. Upon information and belief, Defendants adopted and continued to use "The Node Firm" name with knowledge of Job's (now YLD's) ownership of same. Despite this knowledge and the fact that Defendants could provide goods and services under another name, it decided instead to misappropriate "The Node Firm" name and use it as its own.

142. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

143. Defendants' acts are causing and continue to cause YLD irreparable harm in the nature of loss of control over its reputation, and loss of substantial consumer goodwill. This irreparable harm to YLD will continue, without any adequate remedy at law, unless and until Defendants' unlawful conduct is enjoined by this Court.

## **COUNT VII**

### **UNJUST ENRICHMENT** **(Against All Defendants)**

144. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -143 above as though fully set forth herein.

145. Defendants are using YLD's trademark, and the goodwill associated therewith, for their own commercial gain without making any payments to YLD.

146. Upon information and belief, Shaw, McCann and Schlueter started TNF LLC, with the intention to take the clients, leads, and goodwill already developed in "The Node Firm" brand name and use it for their own commercial benefit.

147. Upon information and belief, when TNF LLC was formed, at the instruction of Shaw and McCann, TNF LLC took over the clients and business leads and started using "The Node Firm" name so that TNF LLC could utilize the goodwill associated with said name for their own commercial benefit.

148. Upon information and belief, TNF LLC have obtained monetary benefit from their use of "The Node Firm" name and the goodwill associated therewith, without payment or compensation to YLD.

149. Upon information and belief, by way of just one example, based on the reputation of "The Node Firm" brand, PayPal and Pearson Education, believing that TNF LLC was associated with "The Node Firm" brand, entered into contracts with TNF LLC wherein TNF LLC would provide training services in exchange for over one million dollars (\$1,000,000).

150. Upon information and belief, Shaw and McCann also benefitted from their use of "The Node Firm" name, as they were compensated by TNF LLC.

151. Upon information and belief, Node Source and NS Inc., have also benefitted from the use of "The Node Firm" name and the goodwill associated therewith as they have taken over the business of TNF LLC and are mere continuations of same and benefit from the reputation and goodwill associated with "The Node Firm" brand.

152. Upon information and belief, Defendants' above described benefit has been at the expense of YLD and equity and good conscience require restitution.

153. YLD is entitled to the reasonable value Defendants' use of "The Node Firm" name, and the goodwill and trust in same, which Defendants benefitted from, in an amount to be determined at trial.

### **COUNT VIII**

#### **FRAUDULENT CONVEYANCE** **(Against Node Source)**

154. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -153 above as though fully set forth herein.

155. Upon information and belief, on or about February 25, 2014, very shortly after receiving Plaintiff's cease and desist letter which *inter alia*, demanded that TNF LLC, Shaw and McCann cease and desist from use of the name "The Node Firm" and demanded compensation for past use of said property, Shaw and McCann, formed a new company under the name Node Source LLC.

156. Upon information and belief, at the time Node Source was formed Plaintiff was a present and/or future creditor of TNF LLC and Plaintiff's identity and claims were known to TNF LLC, Shaw and McCann.

157. Upon information and belief, at the time Node Source was formed, TNF LLC was the owner of assets, including property, capital, cash, contracts and receivables that could have been used as payment for Plaintiff's claims.

158. Upon information and belief, TNF LLC transferred all of its assets including, property, customer lists, capital, cash, contracts, receivables, and business operations to Node Source, an entity owned and controlled by McCann and Shaw, without

adequate or any compensation therefor, and Node Source is operating as a mere continuation of TNF LLC.

159. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source caused TNF LLC to become insolvent and/or with unreasonably small capital and/or without an ability to pay the debts claimed by Plaintiff.

160. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source, shortly after Plaintiff's cease and desist letter including a demand for compensation, was intended to hinder, delay and/or defraud YLD and to avoid making payments to YLD or to avoid having assets sufficient to satisfy YLD's claims.

161. Upon information and belief, Shaw and McCann own the majority of the ownership interest in TNF LLC and Node Source.

162. Upon information and belief, prior to the above transfers, Shaw, McCann, and TNF LLC had knowledge of Plaintiff's claims.

163. Upon information and belief, after the above transfers, Shaw and McCann still retained control over the property and assets that were transferred from TNF LLC to Node Source, by virtue of their control over Node Source.

164. Upon information and belief, the assets that were transferred from TNF LLC to Node Source were the only assets of TNF LLC, and the only assets that would have been available to satisfy Plaintiff's claims.

165. Upon information and belief, no consideration, and/or inadequate consideration, was paid to TNF LLC for the assets it transferred to Node Source.

166. Upon information and belief, the above conveyances rendered TNF LLC insolvent or with an unreasonably small amount of property.

167. Upon information and belief, the conveyances were made to hinder, delay or defraud Plaintiff's ability to recover on any potential claims against TNF LLC.

168. Upon information and belief, Node Source, was not a transferee for fair consideration without knowledge of the fraud at the time of its acquisition of TNF LLC's assets.

169. As such, the above conveyances were fraudulent against Plaintiff pursuant to Debtor and Creditor Law §§ 270 *et seq.*

170. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

171. In accordance with Debt. & Cred. Law § 276-a, by reason of TNF LLC, Node Source, Shaw and McCann's fraudulent transfers and conveyances, YLD has been forced to expend, and will in the future expend, considerable sums of money for counsel fees, with interest.

172. By reason of the foregoing, Node Source is liable to Plaintiff for all sums TNF LLC is liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

173. As a result of the foregoing, Plaintiff is entitled to (i) have the above-described conveyances set aside to the extent necessary to satisfy their claim or (ii) to disregard the conveyances and to attach or levy execution upon the property conveyed.

174. Plaintiff is also entitled to recover its reasonable costs and attorneys' fees pursuant to Debt. & Cred. Law § 276-a.

**COUNT IX**

**FRAUDULENT CONVEYANCE**  
**(Against NS Inc.)**

175. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -174 above as though fully set forth herein.

176. The Complaint in the instant action was filed against Shaw, McCann, TNF LLC and Node Source on or about February 5, 2015.

177. The Summonses and Complaint in the instant action was sent to counsel for Defendants on or about February 5, 2015.

178. The Summonses and Complaint in the instant action was served on Shaw, McCann and Node Source on or about February 11, 2015.

179. Upon information and belief, on or about February 18, 2015, after receiving the Summons and Complaint in the instant action, Shaw and McCann, formed NS Inc., an entity that they own and control.

180. Upon information and belief, on or about February 18, 2015, after receiving the Summons and Complaint in the instant action Node Source converted to a Delaware corporation under the name NodeSource, Inc.

181. Upon information and belief, by virtue of this conversion Node Source transferred all of its assets including, property, customer lists, capital, cash, contracts, receivables, and business operations to NS Inc., an entity owned and controlled by McCann and Shaw, without adequate or any compensation therefor, and NS Inc., is operating as a mere continuation of Node Source.

182. Upon information and belief, NS Inc., is subject to all actions previously taken by Node Source and its members.



183. Upon information and belief, NS Inc., is subject to all of the debts, liabilities and obligations of Node Source.

184. Upon information and belief NS Inc., is deemed to be the same entity as Node Source.

185. Upon information and belief, the existence of NS Inc., is deemed to have commenced on the date that Node Source commenced its existence, i.e. February 25, 2014.

186. Upon information and belief, all liabilities of Node Source, which has converted to NS Inc., remain attached to NS Inc., and may be enforced against NS Inc., to the same extent as if said liabilities had originally been incurred or contracted by NS Inc.

187. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

188. In accordance with Debt. & Cred. Law § 276-a, by reason of Defendants' fraudulent transfers and conveyances, YLD has been forced to expend, and will in the future expend, considerable sums of money for counsel fees, with interest.

189. By reason of the foregoing, NS Inc., is liable to Plaintiff for all sums TNF LLC and/or Node Source are liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

190. As a result of the foregoing, Plaintiff is entitled to (i) have the conveyances described in Count VIII set aside to the extent necessary to satisfy their claim or (ii) to disregard the conveyances described in Count VIII and to attach or levy execution upon the property conveyed.

191. Plaintiff is also entitled to recover its reasonable costs and attorneys' fees pursuant to Debt. & Cred. Law § 276-a.

**COUNT X**

**FRAUDULENT CONVEYANCE**  
**(Against NS Inc.)**

192. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -174 above as though fully set forth herein.

193. The Complaint in the instant action was filed against Shaw, McCann, TNF LLC and Node Source on or about February 5, 2015.

194. The Summonses and Complaint in the instant action was sent to counsel for Defendants on or about February 5, 2015.

195. The Summons and Complaint in the instant action was served on Shaw, McCann and Node Source on or about February 11, 2015.

196. Upon information and belief, on or about February 18, 2015, after receiving the Summonses and Complaint in the instant action, Shaw and McCann, formed NS Inc., an entity that they own and control.

197. Upon information and belief, at the time NS Inc., was formed YLD was a present and/or future creditor of Node Source and Plaintiff's identity and claims were known to Node Source, Shaw and McCann.

198. Upon information and belief, at the time NS Inc., was formed, Node Source was the owner of assets, including property, capital, cash, contracts and receivables that could have been used as payment for Plaintiff's claims.

199. Upon information and belief, within days after being served with the Complaint in the within action Node Source, an entity owned and controlled by McCann

and Shaw, transferred and/or gave possession of its assets, including property, customer lists, capital, cash, contracts, receivables, and business operations to NS Inc., and all rights thereto, without adequate or any compensation therefor, and NS, Inc., is operating as a mere continuation of Node Source.

200. Upon information and belief, Node Source transferred all of its assets including but not limited to, property, customer lists, capital, cash, contracts, receivables, and business operations, to NS Inc., without adequate or fair compensation.

201. Upon information and belief, Shaw and McCann own the majority of the ownership interest in Node Source and NS Inc.

202. Upon information and belief, prior to the above transfers, Shaw, McCann, and Node Source had knowledge of Plaintiff's claims.

203. Upon information and belief, after the above transfers, Shaw and McCann still retained control over the property and assets that were transferred from Node Source to NS Inc., by virtue of their control over NS Inc.

204. Upon information and belief, the assets that were transferred from Node Source to NS Inc., were the only assets of Node Source, and the only assets that would have been available to satisfy Plaintiff's claims.

205. Upon information and belief, NS Inc., is subject to all actions previously taken by Node Source's members.

206. Upon information and belief, NS Inc., is subject to all of the debts, liabilities and obligations of Node Source.

207. Upon information and belief, Node Source's conveyance of the afore-stated assets to NS Inc., caused Node Source to become insolvent and/or with unreasonably small

capital and/or without an ability to pay the debts claimed by Plaintiff and/or a shell company.

208. Upon information and belief, Node Source's conveyance of the afore-stated assets to NS Inc., shortly after receipt of the Complaint in this action, was intended to hinder, delay and/or defraud YLD.

209. Upon information and belief, no consideration, and/or inadequate consideration, was paid to Node Source for the assets it transferred to NS Inc.

210. Upon information and belief, the above conveyances rendered Node Source insolvent or with an unreasonably small amount of property.

211. Upon information and belief, the conveyances were made to hinder, delay or defraud Plaintiff's ability to recover on any potential claims against Node Source.

212. Upon information and belief, NS Inc., was not a transferee for fair consideration without knowledge of the fraud at the time of its acquisition of Node Source's assets.

213. As such, the above conveyances were fraudulent against Plaintiff pursuant to Debtor and Creditor Law §§ 270 *et seq.*

214. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

215. In accordance with Debt. & Cred. Law § 276-a, by reason of TNF LLC, Node Source, Shaw and McCann's fraudulent transfers and conveyances, YLD has been forced to expend, and will in the future expend, considerable sums of money for counsel fees, with interest.

216. By reason of the foregoing, NS Inc., is liable to Plaintiff for all sums TNF LLC and/or Node Source are liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

217. As a result of the foregoing, Plaintiff is entitled to (i) have the above-described conveyances set aside to the extent necessary to satisfy their claim or (ii) to disregard the conveyances and to attach or levy execution upon the property conveyed.

218. Plaintiff is also entitled to recover its reasonable costs and attorneys' fees pursuant to Debt. & Cred. Law § 276-a.

**WHEREFORE**, Plaintiff respectfully requests judgment against the Defendants, and each of them jointly and severally, as follows:

a) On Counts I through IV, for such permanent injunctive relief as is necessary to prevent or restrain infringement of the Copyrighted Training Materials, including a preliminary injunction requiring that Defendants and their agents, servants, employees, officers, directors, attorneys, successors, assigns, licensees, and all others in active concert or participation with any of them, cease infringing, publishing, licensing, exploiting, or causing, aiding, enabling, facilitating, encouraging, promoting, inducing or materially contributing to or participating in the infringement, publishing, licensing, or exploiting of any of YLD's copyrights or exclusive rights in and to the Training Materials protected by the Copyright Act (whether now in existence or hereafter created);

b) On Counts I through IV, that the Court enters judgment against Defendants, and each of them jointly and severally, that Defendants have infringed YLD's rights

in the copyright in the Training Materials under 17 U.S.C. §501, and that the infringement by Defendants was willful;

c) On counts I through IV,

- i. that the Court enter judgment against the Defendants, jointly and severally, for damages suffered by YLD as a result of the infringement complained of herein, as well as disgorgement of any profits attributable to the Defendants' infringement, including the value of all gains, profits, advantages, benefits, and consideration derived by Defendants from and as a result of their infringement of YLD's copyright in the Training Materials, in an amount to be determined at trial; or
- ii. In the alternative, if YLD so elects, in lieu of recovery of their actual damages and Defendants' profits, for an award of statutory damages against Defendants, for their acts of willful copyright infringement;

d) That the Court enters an Order pursuant to 17 U.S.C. § 503 mandating the impounding of all infringing copies of the Training Materials, including the derivative works created therefrom, and any other materials prepared by Defendants containing any copies or any portions thereof;

e) For costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505;

f) Defendants and all of their agents, officers, employees, representatives, successors, assigns, attorneys, and all other persons acting for, with, by, through, or under authority from Defendants, or in concert or participation with Defendants, and each of them, should be permanently enjoined, from:

- i. using “The Node Firm” name, or any other imitation or simulation thereof in connection with Defendants’ services;
- ii. using any trademark, service mark, name, logo, design or source designation of any kind on or in connection with Defendants’ services that is likely to cause confusion, mistake, deception, or public misunderstanding that such services are provided by YLD, or are sponsored or authorized by or in any way connected or related to YLD;
- iii. passing off, palming off, or assisting in passing off or palming off, Defendants’ services as those of YLD, or otherwise continuing any and all acts of unfair competition as alleged in this Complaint;
- iv. Engaging in any activity constituting unfair competition with YLD, or constituting an infringement of YLD’s trade name “The Node Firm”;
- v. Registering or applying to register as a trademark, service mark, trade name, internet domain name or any other source identifier or symbol of origin, that is at all similar “The Node Firm,” or any other mark or name that infringes on or is likely to be confused with YLD’s trade name “The Node Firm”; and
- vi. Opposing the application for, or petitioning for the cancellation of, any registration for “The Node Firm” that YLD has applied for or may apply for in the future;

g) That Defendants be required to account for and pay any and all profits derived from the provisioning of its services and for all damages sustained by YLD by reason of said acts of infringement and unfair competition complained of herein;

h) That Defendants pay YLD for all of Defendants' profits, gains and sums and for all damages sustained arising from the acts of infringement and unfair competition alleged herein, including that YLD should be awarded all damages caused by the acts forming the basis of this Complaint, in an amount to be determined at trial, plus interest thereon;

i) That this Court award YLD treble the amount of actual damages suffered by YLD in an amount to be determined at trial;

j) The costs of this action;

k) That this is an exceptional case and that Defendants should be required to pay to YLD its reasonable attorneys' fees pursuant to 15 U.S. C. § 1117(a);

l) Based on Defendants' willful and deliberate infringement of YLD's trade name, and by reason of Defendants' fraud and palming off, and to deter such conduct in the future, YLD should be awarded punitive damages;

m) On Count VII, that Defendants account and pay restitution to YLD for the benefits that it has obtained unjustly arising from Defendants' use of the "The Node Firm" name, brand and the goodwill, and from the acts of unjust enrichment alleged herein, in a sum to be determined at trial, plus interest thereon;

n) On Counts VIII-X, a judgement be entered against the defendants named therein in a sum to be determined at trial, which represents all sums TNF LLC and/or Node Source are liable to Plaintiff for as set forth in the above causes of action;



o) On Counts VIII-X, that the transfers and conveyances described therein, be adjudged fraudulent and void, and be declared null and void and set aside;

p) On Counts VIII-X, that Defendants be compelled to account for assets fraudulently conveyed;

q) On Counts VIII-X, that Plaintiff have judgment against Defendants for a sum to be determined at trial, but not less than one million dollars (\$1,000,000.00) plus interest thereon;

r) Costs and attorneys' fees; and

s) For such other and further relief in favor of Plaintiff as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury on all claims for relief and issues triable by jury.

Dated: New York, New York  
May 28, 2015

Respectfully submitted,  
ADELMAN MATZ, P.C.



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# **EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

YLD LIMITED,	X	
	:	
	:	
Plaintiff,	:	
	:	
- v. -	:	
	:	
THE NODE FIRM, LLC, NODE SOURCE, LLC,	:	
NODESOURCE, INC., DANIEL SHAW, AND	:	
JOE MCCANN,	:	CIVIL ACTION NO.
	:	
Defendants.	:	15-CV-0855 (JPO)
	X	
THE NODE FIRM, LLC, NODE SOURCE, LLC,	:	
NODESOURCE, INC., DANIEL SHAW, AND	:	
JOE MCCANN,	:	
	:	
Counterclaim Plaintiffs/ Third-Party Plaintiffs,	:	
	:	
- v. -	:	
	:	
YLD LIMITED,	:	
	:	
Counterclaim Defendant,	:	
	:	
and	:	
	:	
NUNO JOB,	:	
	:	
Third-Party Counterclaim Defendant.	:	
	X	

**ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS AND  
THIRD-PARTY CLAIMS OF DEFENDANTS THE NODE FIRM, LLC, NODE  
SOURCE, LLC, NODESOURCE, INC., DANIEL SHAW, AND JOE MCCANN**

Defendants The Node Firm, LLC (“TNF”), Node Source, LLC (“NSLLC”), NodeSource, Inc. (“NSI”), Daniel Shaw (“Shaw”), and Joe McCann (“McCann,” and collectively, “Defendants”), hereby submit their answer, affirmative defenses, counterclaims, and third-party

claims in response to the amended complaint (“Amended Complaint”) filed May 28, 2015 by plaintiff YLD Limited (“Plaintiff” or “YLD”).

**I. ANSWER**

Defendants admit certain facts as specifically stated below, deny all other facts alleged in the Amended Complaint, and state as follows:

**NATURE OF THE CASE**

1. Defendants admit that Plaintiff purports to bring claims under the Copyright Act, 17 U.S.C. § 101 *et seq.*, the Lanham Act, 15 U.S.C. § 1051 *et seq.*, New York common law, and New York Debtor and Creditor Law § 270 *et seq.*, but deny any remaining allegations of Paragraph 1 of the Amended Complaint, and further deny that Plaintiff is entitled to any relief.

**JURISDICTION AND VENUE**

2. With respect to Paragraph 2 of the Amended Complaint, Defendants admit that this Court has subject matter jurisdiction under one or more of 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338(a) and (b), and 28 U.S.C. § 1367.

- 3. Defendants deny the allegations of Paragraph 3 of the Amended Complaint.
- 4. Defendants deny the allegations of Paragraph 4 of the Amended Complaint.
- 5. Defendants deny the allegations of Paragraph 5 of the Amended Complaint.

**NATURE OF THE PARTIES**

6. With respect to Paragraph 6 of the Amended Complaint, Defendants state that publicly available records indicate that YLD Limited is a private limited company organized under the laws of the United Kingdom, with an address of 32 - 38 Scrutton Street, Suite 5, London EC2A 4RQ, United Kingdom.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of the Amended Complaint.

8. With respect to Paragraph 8 of the Amended Complaint, Defendants admit that TNF is a limited liability company duly formed and existing under the laws of the State of Texas.

9. Defendants admit that TNF has no central office. Defendants deny the remaining allegations of Paragraph 9 of the Amended Complaint.

10. With respect to Paragraph 10 of the Amended Complaint, Defendants admit that, prior to its conversion to NSI, NSLLC was a limited liability company duly formed and existing under the laws of the State of Texas.

11. Defendants admit that NSLLC has no central office. Defendants deny the remaining allegations of Paragraph 11 of the Amended Complaint.

12. With respect to Paragraph 12 of the Amended Complaint, Defendants admit that NSI is a corporation duly formed and existing under the laws of the State of Delaware.

13. Defendants admit that NSI has no central office. Defendants further admit that: (i) certain NSI officers, directors, employees, and agents are located in places all around the world; and (ii) four current NSI employees that have no relation to this Action are currently located in New York State. Defendants deny the remaining allegations of Paragraph 13 of the Amended Complaint.

14. Defendants admit that McCann is an individual. Defendants deny the remaining allegations of Paragraph 14 of the Amended Complaint.

15. With respect to Paragraph 15 of the Amended Complaint, Defendants admit that McCann: (i) owns at least one third of TNF; (ii) previously owned at least one third of NSLLC; (iii) previously served as a Managing Director and Partner of TNF or NSLLC; and (iv) previously had authority to exercise certain control over certain of TNF and NSLLC's operations and decisions.

16. With respect to Paragraph 16 of the Amended Complaint, Defendants admit that McCann owns at least 33.33% of the shares of common stock of NSI. Defendants further admit that McCann: (i) is currently elected to serve NSI as a director on the Board of Directors; (ii) currently holds the position of CEO of NSI; and (iii) has the authority to exercise certain control over certain of NSI's operations and decisions.

17. Defendants admit the allegations of Paragraph 17 of the Amended Complaint.

18. With respect to Paragraph 18 of the Amended Complaint, Defendants admit that Shaw: (i) owns at least one third of TNF and NSLLC; (ii) previously owned at least one third of NSLLC; (iii) previously served as Managing Director and Partner of TNF or NSLLC; and (iv) previously had authority to exercise certain control over certain of TNF and NSLLC's operations and decisions.

19. With respect to Paragraph 19 of the Amended Complaint, Defendants admit that Shaw owns at least 33.33% of the shares of common stock of NSI. Defendants further admit that Shaw: (i) is currently elected to serve NSI as a director on the Board of Directors; (ii) currently holds the position of President of NSI; and (iii) has the authority to exercise certain control over certain of NSI's operations and decisions.

20. Defendants deny the allegations of Paragraph 20 of the Amended Complaint.

### **FACTUAL BACKGROUND**

#### **A. Plaintiff's Alleged Ownership of the Training Materials**

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21 of the Amended Complaint.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 22 of the Amended Complaint.

23. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23 of the Amended Complaint.

24. Defendants state that U.S. Copyright Registration No. TX 7-87-084 is shown by the records available through the United States Copyright Office website ([www.copyright.gov](http://www.copyright.gov)) to be a work titled “A Teacher’s guide to television evaluation for children / by Jill M. Schultz, with Tobe Berkovitz” that reflects an effective date of registration of October 20, 1981.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 24 of the Amended Complaint.

25. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25 of the Amended Complaint.

26. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 26 of the Amended Complaint.

27. The allegations of Paragraph 27 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

**B. Plaintiff’s Alleged Ownership of THE NODE FIRM Mark**

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 28 of the Amended Complaint, except that Defendants specifically deny any suggestion made in Paragraph 28 that Mr. Nuno Job (“Job”) owns any rights in or to the trade name “The Node Firm.”

29. Defendants admit that the WHOIS record for the domain name thenodefirm.com indicates “Creation Date: 2011-11-28T17:32:06-07:00Z” and “Registrant Name: Nuno Job”. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 29 of the Amended Complaint, except that Defendants specifically deny any suggestion made in Paragraph 29 that Job owns any rights in or to the

domain name thenodefirm.com, the email address @thenodefirm.com or any Google Apps service relating thereto, or any website for The Node Firm.

30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 30 of the Amended Complaint, except that Defendants specifically deny any suggestion made in Paragraph 30 that Job owns any rights in or to any social media account, including any Twitter account, under the handle “TheNodeFirm.”

31. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 31 of the Amended Complaint, except that Defendants specifically deny any suggestion made in Paragraph 31 that Job owns any rights in or to “The Node Firm” name or brand.

32. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 32 of the Amended Complaint.

33. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 33 of the Amended Complaint, except that Defendants specifically deny any suggestion made in Paragraph 33 that Job owns any right in or to “The Node Firm” name, or any goodwill associated therewith.

34. Defendants deny the allegations of Paragraph 34 of the Amended Complaint.

35. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 35 of the Amended Complaint, except that Defendants specifically deny any suggestion made in Paragraph 35 that Job or YLD own any right in or to “The Node Firm” trade name or any goodwill associated with same, or the right to sue for all past infringement of “The Node Firm” trade name.



**C. Defendants' Acts**

36. Defendants admit that Shaw was aware that Job had at one point been one of several people who offered and provided consulting services under "The Node Firm" name on behalf of an informal alliance of computer programmers, of which Shaw was a founder. Defendants deny the remaining allegations of Paragraph 36 of the Amended Complaint.

37. Defendants admit that McCann was aware that Job had at one point been one of several people who offered and provided consulting services under "The Node Firm" name on behalf of an informal alliance of computer programmers, of which Shaw was a founder. Defendants deny the remaining allegations of Paragraph 37 of the Amended Complaint.

38. Defendants deny the allegations of Paragraph 38 of the Amended Complaint.

39. Defendants deny the allegations of Paragraph 39 of the Amended Complaint.

40. Defendants deny the allegations of Paragraph 40 of the Amended Complaint.

41. Defendants admit the existence of a letter purported to be from "Axia Law LLC" (signed by Erik Rakoczy) addressed to "The Node Firm LLC, Costa Anestos Registered Agent, Joe McCann and other members and managers" which alleged that Nuno Job and Nodejitsu owned certain intellectual property rights in certain training, branding and other design materials, and demanded a lump sum payment of \$2,500,000. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 41 of the Amended Complaint.

42. Defendants admit that in emails dated February 5, 2013, Robbins made vague suggestions about Nodejitsu's willingness to consider licensing non-specified "existing materials" to "a new properly structured entity", and Job outlined certain terms which he believed to be "the items to formalize." Defendants deny the remaining allegations of Paragraph 42 of the Amended Complaint.

43. Defendants deny the allegations of Paragraph 43 of the Amended Complaint.

44. With respect to Paragraph 44 of the Amended Complaint, Defendants admit that The Node Firm, LLC, a limited liability company, was formed on February 28, 2013, of which Shaw, McCann and Isaac Schlueter (“Schlueter”) were members.

45. With respect to Paragraph 45 of the Amended Complaint, Defendants admit that Shaw, McCann or TNF did not obtain a written license for use of the Training Materials.

46. With respect to Paragraph 46 of the Amended Complaint, Defendants admit that Shaw, McCann or TNF did not obtain a written license for use of the name “The Node Firm”.

47. Defendants deny the allegations of Paragraph 47 of the Amended Complaint.

48. Defendants deny the allegations of Paragraph 48 of the Amended Complaint.

49. Defendants deny the allegations of Paragraph 49 of the Amended Complaint.

50. Defendants deny the allegations of Paragraph 50 of the Amended Complaint.

51. Defendants deny the allegations of the first sentence of Paragraph 51 of the Amended Complaint. The allegations of the second sentence of Paragraph 51 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

52. Defendants deny the allegations of Paragraph 52 of the Amended Complaint.

53. The allegations of Paragraph 53 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

54. Defendants deny the allegations of Paragraph 54 of the Amended Complaint.

55. Defendants deny the allegations of Paragraph 55 of the Amended Complaint.

56. Defendants deny the allegations of Paragraph 56 of the Amended Complaint.

57. Defendants deny the allegations of Paragraph 57 of the Amended Complaint.

58. Defendants deny the allegations of Paragraph 58 of the Amended Complaint.

59. Defendants deny the allegations of Paragraph 59 of the Amended Complaint.

60. Defendants deny the allegations of Paragraph 60 of the Amended Complaint.

61. Defendants admit that Node Source, LLC was formed on February 25, 2014.

Defendants deny the remaining allegations of Paragraph 61 of the Amended Complaint.

62. Defendants deny the allegations of Paragraph 62 of the Amended Complaint.

63. Defendants deny the allegations of Paragraph 63 of the Amended Complaint.

64. Defendants admit that NSLLC shared some of the same management and personnel as TNF. Defendants deny the remaining allegations of Paragraph 64 of the Amended Complaint.

65. Defendants deny the allegations of Paragraph 65 of the Amended Complaint.

66. Defendants admit that NSLLC is in privity with TNF. Defendants deny the remaining allegations of Paragraph 66 of the Amended Complaint.

67. Defendants deny the allegations of Paragraph 67 of the Amended Complaint.

68. Defendants deny the allegations of Paragraph 68 of the Amended Complaint.

69. Defendants deny the allegations of Paragraph 69 of the Amended Complaint.

70. Defendants deny the allegations of Paragraph 70 of the Amended Complaint.

71. Defendants deny the allegations of Paragraph 71 of the Amended Complaint.

72. Defendants deny the allegations of Paragraph 72 of the Amended Complaint.

73. Defendants deny the allegations of Paragraph 73 of the Amended Complaint.

74. Defendants deny the allegations of Paragraph 74 of the Amended Complaint.

75. Defendants deny the allegations of Paragraph 75 of the Amended Complaint.

76. Defendants deny the allegations of Paragraph 76 of the Amended Complaint.

77. Defendants deny the allegations of Paragraph 77 of the Amended Complaint.

78. Defendants deny the allegations of Paragraph 78 of the Amended Complaint.

**COUNT I**  
**Copyright Infringement of the Training Materials**  
**(Against All Defendants)**

79. With respect to Paragraph 79 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-78 above as though fully set forth herein.

80. Defendants deny the allegations of Paragraph 80 of the Amended Complaint.

81. Defendants deny the allegations of Paragraph 81 of the Amended Complaint.

82. Defendants deny the allegations of Paragraph 82 of the Amended Complaint.

83. With respect to Paragraph 83 of the Amended Complaint, Defendants admit that neither Nodejitsu nor YLD provided written authorization to any of the Defendants to copy, reproduce, display, distribute, license, or otherwise exploit the Training Materials or any derivative thereof.

84. With respect to Paragraph 84 of the Amended Complaint, Defendants admit that neither YLD nor Nodejitsu provided written authorization to any of the Defendants to make derivative works of the Training Materials.

85. With respect to Paragraph 85 of the Amended Complaint, Defendants admit that they did not obtain any written permission, consent or license from YLD to use, distribute, copy, reproduce, display or exploit the Training Materials, nor did they obtain any written permission, consent or license from YLD to prepare derivative works of the Training Materials.

86. Defendants deny the allegations of Paragraph 86 of the Amended Complaint.

87. Defendants deny the allegations of Paragraph 87 of the Amended Complaint.

88. Defendants deny the allegations of Paragraph 88 of the Amended Complaint.

89. The allegations of Paragraph 89 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

90. Defendants deny the allegations of Paragraph 90 of the Amended Complaint.

91. Defendants deny the allegations of Paragraph 91 of the Amended Complaint.

92. Defendants deny the allegations of Paragraph 92 of the Amended Complaint.

93. Defendants deny the allegations of Paragraph 93 of the Amended Complaint.

94. Defendants deny the allegations of Paragraph 94 of the Amended Complaint.

95. Defendants deny the allegations of Paragraph 95 of the Amended Complaint.

**COUNT II**  
**Inducement of Copyright Infringement of the Training Materials**  
**(Against All Defendants)**

96. With respect to Paragraph 96 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-95 above as though fully set forth herein.

97. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 97 of the Amended Complaint.

98. Defendants deny the allegations of Paragraph 98 of the Amended Complaint.

99. Defendants deny the allegations of Paragraph 99 of the Amended Complaint.

100. Defendants deny the allegations of Paragraph 100 of the Amended Complaint.

101. Defendants deny the allegations of Paragraph 101 of the Amended Complaint.

102. Defendants deny the allegations of Paragraph 102 of the Amended Complaint.

103. Defendants deny the allegations of Paragraph 103 of the Amended Complaint.

**COUNT III**  
**Contributory Copyright Infringement of the Training Materials**  
**(Against All Defendants)**

104. With respect to Paragraph 104 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-103 above as though fully set forth herein.

105. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 105 of the Amended Complaint.

106. Defendants deny the allegations of Paragraph 106 of the Amended Complaint.

107. Defendants deny the allegations of Paragraph 107 of the Amended Complaint.

108. Defendants deny the allegations of Paragraph 108 of the Amended Complaint.

109. Defendants deny the allegations of Paragraph 109 of the Amended Complaint.

110. Defendants deny the allegations of Paragraph 110 of the Amended Complaint.

111. Defendants deny the allegations of Paragraph 111 of the Amended Complaint.

112. Defendants deny the allegations of Paragraph 112 of the Amended Complaint.

**COUNT IV**  
**Vicarious Copyright Infringement of the Training Materials**  
**(Against All Defendants)**

113. With respect to Paragraph 113 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-112 above as though fully set forth herein.

114. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 114 of the Amended Complaint.

115. Defendants deny the allegations of Paragraph 115 of the Amended Complaint.

116. Defendants deny the allegations of Paragraph 116 of the Amended Complaint.

117. Defendants deny the allegations of Paragraph 117 of the Amended Complaint.

- 118. Defendants deny the allegations of Paragraph 118 of the Amended Complaint.
- 119. Defendants deny the allegations of Paragraph 119 of the Amended Complaint.
- 120. Defendants deny the allegations of Paragraph 120 of the Amended Complaint.
- 121. Defendants deny the allegations of Paragraph 121 of the Amended Complaint.
- 122. Defendants deny the allegations of Paragraph 122 of the Amended Complaint.
- 123. Defendants deny the allegations of Paragraph 123 of the Amended Complaint.
- 124. Defendants deny the allegations of Paragraph 124 of the Amended Complaint.
- 125. Defendants deny the allegations of Paragraph 125 of the Amended Complaint.
- 126. Defendants deny the allegations of Paragraph 126 of the Amended Complaint.

**COUNT V**  
**Trademark Infringement in Violation of 15 U.S.C. § 1125(a)**  
**(Against All Defendants)**

127. With respect to Paragraph 127 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-126 above as though fully set forth herein.

- 128. Defendants deny the allegations of Paragraph 128 of the Amended Complaint.
- 129. Defendants deny the allegations of Paragraph 129 of the Amended Complaint.
- 130. Defendants deny the allegations of Paragraph 130 of the Amended Complaint.
- 131. Defendants deny the allegations of Paragraph 131 of the Amended Complaint.
- 132. Defendants deny the allegations of Paragraph 132 of the Amended Complaint.
- 133. Defendants deny the allegations of Paragraph 133 of the Amended Complaint.
- 134. Defendants deny the allegations of Paragraph 134 of the Amended Complaint.
- 135. Defendants deny the allegations of Paragraph 135 of the Amended Complaint.

**COUNT VI**  
**Common Law Unfair Competition**  
**(Against All Defendants)**

136. With respect to Paragraph 136 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-135 above as though fully set forth herein.

137. Defendants deny the allegations of Paragraph 137 of the Amended Complaint.

138. Defendants deny the allegations of Paragraph 138 of the Amended Complaint.

139. Defendants deny the allegations of Paragraph 139 of the Amended Complaint.

140. Defendants deny the allegations of Paragraph 140 of the Amended Complaint.

141. Defendants deny the allegations of Paragraph 141 of the Amended Complaint.

142. Defendants deny the allegations of Paragraph 142 of the Amended Complaint.

143. Defendants deny the allegations of Paragraph 143 of the Amended Complaint.

**COUNT VII**  
**Unjust Enrichment**  
**(Against All Defendants)**

144. With respect to Paragraph 144 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-143 above as though fully set forth herein.

145. Defendants deny the allegations of Paragraph 145 of the Amended Complaint.

146. Defendants deny the allegations of Paragraph 146 of the Amended Complaint.

147. Defendants admit that TNF used “The Node Firm” name to utilize the goodwill that Shaw and McCann developed with said name for commercial benefit. Defendants deny the remaining allegations of Paragraph 147 of the Amended Complaint.



148. Defendants admit that TNF has obtained monetary benefits for services performed by TNF under the name “The Node Firm”, which name has goodwill as a result of use by TNF. Defendants further admit that no payment or compensation was made to YLD.

149. Defendants deny the allegations of Paragraph 149 of the Amended Complaint.

150. Defendants admit that Shaw and McCann performed services on behalf of TNF under the name “The Node Firm.” Defendants further admit that Shaw and McCann were compensated for services they performed on behalf of TNF. Defendants deny any remaining allegations of Paragraph 150 of the Amended Complaint.

151. Defendants admit that NSLLC and NSI have benefitted from the goodwill associated with the name “The Node Firm” as established by TNF, to the extent that McCann and Shaw performed services for all such entities. Defendants further admit that NSLLC, NSI and TNF are/were all in privity. Defendants deny any remaining allegations of Paragraph 151 of the Amended Complaint.

152. Defendants deny the allegations of Paragraph 152 of the Amended Complaint.

153. Defendants deny the allegations of Paragraph 153 of the Amended Complaint.

**COUNT VIII**  
**Fraudulent Conveyance**  
**(Against NSLLC)**

154. With respect to Paragraph 154 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-153 above as though fully set forth herein.

155. Defendants admit that Node Source, LLC was formed on February 25, 2014. Defendants deny the remaining allegations of Paragraph 155 of the Amended Complaint.

156. Defendants deny the allegations of Paragraph 156 of the Amended Complaint.

157. Defendants admit that as of February 25, 2014, TNF was the owner of certain assets, including capital, cash, contracts and receivables. Defendants deny the remaining allegations of Paragraph 157 of the Amended Complaint.

158. Defendants deny the allegations of Paragraph 158 of the Amended Complaint.

159. Defendants deny the allegations of Paragraph 159 of the Amended Complaint.

160. Defendants deny the allegations of Paragraph 160 of the Amended Complaint.

161. With respect to Paragraph 161 of the Amended Complaint, Defendants admit that Shaw and McCann currently or previously own or owned the majority of the ownership interests in TNF and NSLLC.

162. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 162 of the Amended Complaint.

163. Defendants deny the allegations of Paragraph 163 of the Amended Complaint.

164. Defendants deny the allegations of Paragraph 164 of the Amended Complaint.

165. Defendants deny the allegations of Paragraph 165 of the Amended Complaint.

166. Defendants deny the allegations of Paragraph 166 of the Amended Complaint.

167. Defendants deny the allegations of Paragraph 167 of the Amended Complaint.

168. The allegations of Paragraph 168 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

169. Defendants deny the allegations of Paragraph 169 of the Amended Complaint.

170. Defendants deny the allegations of Paragraph 170 of the Amended Complaint.

171. Defendants deny the allegations of Paragraph 171 of the Amended Complaint.

172. Defendants deny the allegations of Paragraph 172 of the Amended Complaint.

173. Defendants deny the allegations of Paragraph 173 of the Amended Complaint.

174. Defendants deny the allegations of Paragraph 174 of the Amended Complaint.

**COUNT IX**  
**Fraudulent Conveyance**  
**(Against NSI)**

175. With respect to Paragraph 175 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-174 above as though fully set forth herein.

176. Defendants admit awareness of a complaint filed by YLD Limited against The Node Firm, LLC, Node Source, LLC, Isaac Schlueter, Daniel Shaw, and Joe McCann stamped as received on February 5, 2015 by U.S.D.C.S.D.N.Y Cashiers (the “Complaint”). Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 176 of the Amended Complaint.

177. Defendants admit that, on February 5, 2015, their counsel received by email from Sarah Matz a copy of the Complaint and certain summonses. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 177 of the Amended Complaint.

178. Defendants admit that they accepted service of the Complaint, and summonses for NSLLC, Shaw, and McCann, on February 11, 2015. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 178 of the Amended Complaint.

179. Defendants admit that NSI was formed on February 17, 2015, and that Shaw and McCann are members of NSI. Defendants deny the remaining allegations of Paragraph 179 of the Amended Complaint.

180. Defendants admit that on February 17, 2015, NSLLC converted to NSI, and that Shaw and McCann are members of NSI. Defendants deny the remaining allegations of Paragraph 180 of the Amended Complaint.

181. Defendants admit that NSLLC and NSI are in privity. Defendants deny the remaining allegations of Paragraph 181 of the Amended Complaint.

182. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 182 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

183. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 183 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

184. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 184 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

185. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 185 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

186. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 186 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

187. Defendants deny the allegations of Paragraph 187 of the Amended Complaint.

188. Defendants deny the allegations of Paragraph 188 of the Amended Complaint.

189. Defendants deny the allegations of Paragraph 189 of the Amended Complaint.

190. Defendants deny the allegations of Paragraph 190 of the Amended Complaint.

191. Defendants deny the allegations of Paragraph 191 of the Amended Complaint.

**COUNT X**  
**Fraudulent Conveyance**  
**(Against NSI)**

192. With respect to Paragraph 192 of the Amended Complaint, Defendants repeat and incorporate by reference their responses in Paragraphs 1-191 above as though fully set forth herein.

193. Defendants admit awareness of the Complaint. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 193 of the Amended Complaint.

194. Defendants admit that, on February 5, 2015, their counsel received by email from Sarah Matz a copy of the Complaint and certain summonses. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 194 of the Amended Complaint.

195. Defendants admit that they accepted service of the Complaint, and summonses for NSLLC, Shaw, and McCann, on February 11, 2015. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 195 of the Amended Complaint.

196. Defendants admit that NSI was formed on February 17, 2015, and that Shaw and McCann are members of NSI. Defendants deny the remaining allegations of Paragraph 196 of the Amended Complaint.

197. Defendants deny the allegations of Paragraph 197 of the Amended Complaint.

198. Defendants admit that as of February 17, 2015, NSLLC was the owner of certain assets, including capital, cash, contracts and receivables. Defendants deny the remaining allegations of Paragraph 198 of the Amended Complaint.

199. Defendants deny the allegations of Paragraph 199 of the Amended Complaint.

200. Defendants deny the allegations of Paragraph 200 of the Amended Complaint.

201. With respect to Paragraph 201 of the Amended Complaint, Defendants admit that Shaw and McCann currently or previously own or owned the majority of the ownership interests in NSLLC and NSI.

202. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 202 of the Amended Complaint.

203. Defendants admit that NSLLC and NSI are in privity. Defendants deny the remaining allegations of Paragraph 203 of the Amended Complaint.

204. Defendants deny the allegations of Paragraph 204 of the Amended Complaint.

205. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 205 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

206. Defendants admit that NSLLC and NSI are in privity. The remaining allegations of Paragraph 206 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

207. Defendants deny the allegations of Paragraph 207 of the Amended Complaint.

208. Defendants deny the allegations of Paragraph 208 of the Amended Complaint.

209. Defendants deny the allegations of Paragraph 209 of the Amended Complaint.

210. Defendants deny the allegations of Paragraph 210 of the Amended Complaint.

211. Defendants deny the allegations of Paragraph 211 of the Amended Complaint.

212. The allegations of Paragraph 212 of the Amended Complaint constitute conclusions of law or legal argument to which no responsive pleading is necessary.

213. Defendants deny the allegations of Paragraph 213 of the Amended Complaint.

214. Defendants deny the allegations of Paragraph 214 of the Amended Complaint.

215. Defendants deny the allegations of Paragraph 215 of the Amended Complaint.

216. Defendants deny the allegations of Paragraph 216 of the Amended Complaint.

217. Defendants deny the allegations of Paragraph 217 of the Amended Complaint.

218. Defendants deny the allegations of Paragraph 218 of the Amended Complaint.

## **II. AFFIRMATIVE DEFENSES**

219. In addition to the affirmative defenses and counterclaims identified below, Defendants reserve the right to allege additional defenses and counterclaims as they may become known or available through the course of discovery.

220. Defendants reallege and incorporate by reference the matters alleged above, and further state the following as their affirmative defenses:

### **FIRST AFFIRMATIVE DEFENSE**

221. Plaintiff's Amended Complaint fails to state any cause of action against Defendants upon which any relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

222. All of Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands.

### **THIRD AFFIRMATIVE DEFENSE**

223. All of Plaintiff's claims are barred in whole or in part by the doctrine of laches.

**FOURTH AFFIRMATIVE DEFENSE**

224. All of Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

**FIFTH AFFIRMATIVE DEFENSE**

225. All of Plaintiff's claims are barred in whole or in part by the doctrine of acquiescence.

**SIXTH AFFIRMATIVE DEFENSE**

226. Defendants have not infringed any valid and enforceable trademark rights owned by Plaintiff.

**SEVENTH AFFIRMATIVE DEFENSE**

227. Defendants have not infringed any valid and enforceable copyright rights owned by Plaintiff.

**EIGHTH AFFIRMATIVE DEFENSE**

228. Plaintiff's trademark claims are barred in whole or in part because the mark THE NODE FIRM is legally descriptive and Plaintiff has not acquired secondary meaning therein.

**NINTH AFFIRMATIVE DEFENSE**

229. To the extent that Plaintiff (or any predecessor thereof) has at any time used the mark THE NODE FIRM, Plaintiff (or any predecessor thereof) has not used the mark THE NODE FIRM for at least several years and does not have an intent to resume use. Accordingly, Plaintiff's trademark claims are barred in whole or in part because rights (if any) that Plaintiff (or any predecessor thereof) may have had in the mark THE NODE FIRM have been abandoned.

**TENTH AFFIRMATIVE DEFENSE**

230. Plaintiff lacks standing to maintain this Action because, upon information and belief, any alleged assignment of the mark THE NODE FIRM, or any trademark application



therefor, from Job to YLD was invalid because Job never possessed any valid rights in the mark THE NODE FIRM, or any trademark application therefor.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

231. Plaintiff's copyright claims are barred in whole or in part by the doctrine of fair use.

#### **TWELFTH AFFIRMATIVE DEFENSE**

232. Plaintiff's copyright claims are barred in whole or in part because Plaintiff does not own, does not possess, is not an exclusive licensee of, and/or otherwise does not have a valid copyright registration.

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

233. Plaintiff's copyright claims are barred in whole or in part because Plaintiff does not own U.S. Copyright Registration No. TX 7-87-084 asserted in the Amended Complaint.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

234. Plaintiff's copyright claims are barred in whole or in part because the deposit materials submitted by Plaintiff to the United States Copyright Office in connection with Copyright Registration No. TX 7-877-084 (the "Asserted Registration") are improper, rendering invalid the Asserted Registration, and any copyright rights claimed by Plaintiff relating thereto. The deposit materials consist of a repository of raw source code materials and software files. An expert programmer of the Node.js language is required to organize, order, compile and build such materials and files into the form of "Training Materials" claimed by Plaintiff (the "Asserted Works"). Additionally, at least one of the files constituting deposit materials is inaccessible. As such, the deposit materials do not accurately reflect, and are not sufficient to protect, the Asserted Works claimed by Plaintiff to be covered by the Asserted Registration.

**FIFTEENTH AFFIRMATIVE DEFENSE**

235. Plaintiff's copyright claims are barred in whole or in part because the Asserted Works are functional, are not original, are in the public domain, or are otherwise not protectable by copyright law and/or are not, and cannot be, protected by the Asserted Registration.

**SIXTEENTH AFFIRMATIVE DEFENSE**

236. Plaintiff's copyright claims are barred in whole or in part by the doctrine of *scènes à faire*.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

237. Plaintiff's copyright claims are barred in whole or in part because there is no substantial similarity between the Asserted Works and any materials reproduced, distributed, displayed, licensed or otherwise exploited by Defendants ("Defendants' Materials"). Therefore, Defendants' Materials do not infringe the Asserted Works or the Asserted Registration.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

238. Plaintiff's copyright claims are barred in whole or in part because Defendants' Materials were created independently and without reference to the Asserted Works.

**NINETEENTH AFFIRMATIVE DEFENSE**

239. Plaintiff's copyright claims are barred in whole or in part by the doctrine of *de minimis* copying (if any), as any protectable portions of the Asserted Works are *de minimis*.

**TWENTIETH AFFIRMATIVE DEFENSE**

240. Plaintiff's unjust enrichment claim is barred in whole or in part because it is a mere duplication of Plaintiff's claims for trademark infringement. Because unjust enrichment is an equitable claim that is unavailable where an adequate remedy at law exists, Plaintiff's unjust enrichment claim is preempted by its trademark infringement claims.

#### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

241. Plaintiff's fraudulent conveyance claims against NSLLC and NSI are barred in whole or in part because Plaintiff could (if granted) obtain the recovery it seeks from TNF, NSLLC and/or NSI, who are all Defendants in this Action. Accordingly, Plaintiff cannot plausibly allege that it is unable to reach certain property or assets of NSLLC and/or NSI to satisfy a judgment.

#### **TWENTY-SECOND AFFIRMATIVE DEFENSE**

242. Defendants have acted innocently, in good faith, and without any reckless disregard, malice, knowledge or injurious intent.

#### **TWENTY-THIRD AFFIRMATIVE DEFENSE**

243. Plaintiff's claims for monetary relief, if any, are limited to actual damages and additional profits.

### **III. COUNTERCLAIMS AND THIRD-PARTY CLAIMS**

244. Defendants reallege and incorporate by reference<sup>1</sup> the matters alleged above, and further state the following as their counterclaims and third-party claims against YLD and Job:

#### **PARTIES**

245. TNF is a limited liability company duly formed under the laws of the State of Texas. While currently not in operation, TNF previously maintained a "virtual" office, allowing its employees to conduct business operations online through the internet from around the world.

246. NSLLC is a limited liability company duly formed under the laws of the State of Texas. While currently not in operation, NSLLC previously maintained a "virtual" office, allowing its employees to conduct business operations online through the internet from around the world.

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<sup>1</sup> All abbreviations used in Section III have the same meanings ascribed to them in Section I or II, as applicable.

247. NSI is a corporation duly formed and existing under the laws of the State of Delaware. NSI maintains a “virtual” office, allowing its employees to conduct business operations online through the internet from around the world.

248. McCann is an individual who works regularly in San Francisco, and is a legal resident of Texas.

249. Shaw is an individual who works and lives in San Francisco.

250. Upon information and belief, Plaintiff/Counterclaim Defendant YLD is a foreign corporation duly formed and existing under the laws of the United Kingdom, with its principal place of business in London.

251. Upon information and belief, Third-Party Counterclaim Defendant Job is an individual who is a citizen of the United Kingdom.

252. Upon information and belief, Job currently resides in the United Kingdom.

253. Upon information and belief, Job is the founder and managing partner of YLD.

#### **JURISDICTION AND VENUE**

254. Jurisdiction of these counterclaims arises under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and under the laws of the United States concerning actions relating to trademarks and copyrights, 28 U.S.C. §§ 1331 and 1338(a). This Court also has supplemental jurisdiction over these counterclaims pursuant to 28 U.S.C. § 1367.

255. This Court has personal jurisdiction over YLD because, *inter alia*, by filing the Amended Complaint, YLD has submitted to the jurisdiction of this Court and of the Northern District of California.

256. Personal jurisdiction as to Job, and venue, are proper in this Court (if the Action is not transferred), and in the Northern District of California (if the Action is transferred), pursuant to 28 U.S.C. § 1391.

## **FACTUAL BACKGROUND**

### **A. The Node Firm: An Informal Alliance**

257. In or around late November 2011, Job joined together with defendant Shaw and three people not mentioned in Plaintiff's Amended Complaint, i.e. Mikeal Rogers ("Rogers"), Pedro Teixeira ("Teixeira") and Paolo Fragomeni ("Fragomeni") (Job, Shaw, Rogers, Teixeira and Fragomeni, collectively, the "Collaborators"), in an informal collaboration of computer programmers knowledgeable about the Node.js computer programming platform. The Collaborators sought to grow the significance of Node.js – also known as Node – through building a community of independent experts who worked in Node (the "Informal Alliance").

258. Rogers suggested that the Informal Alliance brand their collective efforts under the name "The Node Firm" (the "Collective Name"), which suggestion was adopted.

259. The Informal Alliance shared the goal of increasing awareness and use of Node, and heralded their association with "The Node Firm" as a collective marketing tool.

260. The primary services provided by the Informal Alliance were basic training and consulting on Node.js. Informational materials were compiled for use by the Informal Alliance in connection with such training services (the "First Generation Training Materials").

261. The Informal Alliance was not incorporated or otherwise formed as a formal corporate entity.

262. The Informal Alliance had no offices and no employees.

263. Members of the Informal Alliance each performed services under the Collective Name remotely from their own locations around the world, typically from their homes or wherever they were traveling at any given time.

264. For at least a portion of the time period that Job, Teixeira and Fragomeni were affiliated with the Informal Alliance, each also worked for a company called Nodejitsu, Inc. (“Nodejitsu”).

265. Upon information and belief, Nodejitsu is or was a Delaware corporation founded by Charlie Robbins (“Robbins”).

266. There was no written contract between Nodejitsu and the Informal Alliance concerning materials used by the Informal Alliance in performing services under the Collective Name.

267. There were no mutually agreed unwritten business understandings between Nodejitsu and the Informal Alliance concerning materials used by the Informal Alliance in performing services under the Collective Name.

**B. The Node Firm Begins to Formalize Operations**

268. In November 2012, the Collaborators undertook to systemize the Informal Alliance.

269. Upon the urging of the Collaborators, Shaw formed The Node Firm LLC, a Nevada single member LLC, with Shaw as the sole member.

270. Job requested that Shaw assume business development responsibilities for the Informal Alliance, which Shaw agreed to do.

271. Shaw enlisted the assistance of McCann in connection with such business development efforts for, and day-to-day operations of, the Informal Alliance.

272. On December 21, 2012, Job circulated an email to the Collaborators recapping the “ups and downs” of the Informal Alliance over the course of 2012 (“Job’s December 21 Email”).

273. Job’s December 21 Email recognized that the Informal Alliance was getting a lot of interest with respect to subscription services, and professed that the “only problem” of the

Informal Alliance was that “we don’t really have dedicated management, so we are moving slower than customers would like us to.”

274. Job’s December 21 Email went on to announce (annotated with a happy face emoticon) that “Daniel [Shaw] is dedicated to finding someone that dedicates a lot of love to the firm!”

275. Shaw announced in a follow up email to the Collaborators that he would be working on organizational issues for the Informal Alliance over the holidays, in response to which several of the Collaborators lauded Shaw’s efforts.

**C. Several Collaborators Step Aside, a Core Team Rises**

276. From November 2012 through the end of January 2013, Shaw and McCann undertook to review records, learn about liabilities, and otherwise conduct due diligence directed at illuminating the scope of activities engaged in by the Informal Alliance.

277. An email sent by Shaw to the Collaborators dated January 28, 2013 (“Shaw’s January 28 Email”) advised “[i]f we’re going to begin to start servicing subscription clients, we need to get our shit together and run The Node Firm like a proper business fiscally and legally.”

278. Shaw’s January 28 Email further proposed selecting executives who would “essentially be taking over the ‘inner circle’ decision making”, while the Collaborators “will continue to be trusted advisors.” Shaw was proposed as CEO, McCann as COO, and Schlueter as CNO (Chief Node Officer).

279. Responding to Shaw’s January 28 Email, Job agreed that Shaw’s proposal “made a lot of sense.” Job proclaimed that he had “emotional burnout” and would be “stepping aside” from a leadership role. Job also applauded Shaw for assuming a leadership role.

280. Around this time, Job initiated proactive steps to reduce his association with the Informal Alliance. Job removed @thenodefirm from his Twitter client, advising Shaw in an

email dated January 29, 2013 that “i can’t mange [sic] communications of something i don’t manage :)”.

281. On February 28, 2013, Shaw formed TNF, a Texas limited liability company, with Shaw, McCann and Schlueter as members.

282. Throughout the remainder of 2013, under the leadership of Shaw, McCann and Schlueter, the Informal Alliance was transformed from a loose coalition of individuals that performed services under the Collective Name, into an organized, accountable, and professionally-operated venture that performed services under the Collective Name.

283. During this period, TNF undertook several targeted business development initiatives to build the reputation of TNF, including Shaw and McCann pursuing speaking engagements, and TNF holding monthly office hours (via the internet), typically led by Shaw, where people within the tech community could learn about Node, raise specific problems they encountered, and seek advice.

284. During this period, TNF also created new training materials for use in its training engagements, which such training materials were devoid of any original contribution that may have existed in the First Generation Training Materials.

285. Job did not devote material time or dedication to performing services under the Collective Name following the evolution of the Informal Alliance to TNF.

286. Upon information and belief, Job was highly committed to, and spent considerable time on behalf of, Nodejitsu during 2013. Upon information and belief, from December 2011 to August 2013, Job served as Chief Commercial Officer for Nodejitsu, and also acted as an Advisor and Board Member of Nodejitsu from December 2011 to February 2015.



**D. Job Tries to Capitalize on TNF's Success, Then Shuts Down TNF Upon Rejection**

287. At the end of 2013, Job approached Shaw to propose an arrangement whereby Job would run European operations for TNF. Shaw conveyed that he was open to exploring possibilities, though stated that any such arrangement would require Job to work with McCann. Job rejected Shaw's proposal.

288. In or around early 2014, Job autonomously terminated TNF's access to [www.nodefirm.com](http://www.nodefirm.com) (the "TNF Website") and, using Job's access to TNF's DNS servers, rerouted incoming TNF email and calendar requests. Job had originally been responsible for maintaining these accounts on behalf of TNF, and therefore had the ability to control the accounts' access rights.

289. As a result of Job's willful, reckless and malevolent actions, TNF was deprived of the ability to conduct its business, and may have lost opportunities that it was not able to explore due to being stonewalled from receiving email directed to its attention.

290. Because TNF was locked out of its own email, website and calendar, it could no longer conduct business, and was forced to cease day-to-day operations.

**E. NodeSource: A New Company, a New Focus**

291. Shaw and McCann had previously recognized the market need for a new kind of company that specialized in Node.js, one which was different than TNF and which catered to large enterprise customers and provided software development tools, support, and related products and services. Upon being prevented from operating TNF as they had done for over a year, and from representing "The Node Firm" as Shaw had since its inception, Shaw and McCann decided to change paths and pursue a new opportunity.

292. On February 25, 2014, Shaw and McCann formed NSLLC, a Texas limited liability company, with Shaw and McCann as its only members.

293. On February 17, 2015, NSLLC converted to NSI, a Delaware corporation (NSLLC and NSI, hereinafter collectively referred to as “NodeSource”).

294. NodeSource is a product company whose primary business is to develop and sell products to enterprise customers. Any training, consulting or support services provided by NodeSource are ancillary to its sale of products, i.e. to augment its product offerings, and any materials used by NodeSource in connection with any such NodeSource services have been originally created and compiled by NodeSource.

**F. YLD and Job’s Defamatory Statements**

295. Upon information and belief, YLD was formed in November 2013 by Job, who has served as Founder, CEO and/or Managing Director from November 2013 to present.

296. Upon information and belief, YLD provides Node.js consulting and training services.

297. Upon information and belief, Job, individually and/or on behalf of YLD, disseminated false and misleading information about Defendants, to discourage people from engaging in business with NodeSource, and to encourage them to engage in business with YLD.

298. By way of example, on July 14, 2014, Job, individually and/or on behalf of YLD, made statements to Julián Duque (“Duque”), a prospective NodeSource employee, that Shaw and McCann are “thieves” that “stole literally millions of dollars from [Job] and [his] family.” Job further advised Duque “to stay away” from NodeSource and that Shaw and McCann are “bad people with no values” (collectively, the “July 14 Statements”).

**FIRST COUNTERCLAIM AGAINST YLD**  
**Declaration of Noninfringement of Alleged Trademark Rights**

299. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-298 above as though fully set forth herein.

300. An actual and justiciable controversy exists between Defendants and Plaintiff with respect to Defendants' use of the mark THE NODE FIRM because Plaintiff brought the Action alleging that Defendants infringe Plaintiff's trademark rights. Defendants deny these allegations.

301. Absent a declaration of noninfringement of any alleged trademark rights of Plaintiff, Plaintiff will continue to wrongfully assert and pursue claims against Defendants.

302. Defendants have not infringed any valid and enforceable trademark rights asserted by Plaintiff in any manner, willfully or otherwise, and Defendants are entitled to an affirmative declaration to that effect.

**SECOND COUNTERCLAIM AGAINST YLD**  
**Declaration of Trademark Invalidity**

303. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-302 above as though fully set forth herein.

304. An actual and justiciable controversy exists between Defendants and Plaintiff with respect to Defendants' use of the mark THE NODE FIRM because Plaintiff brought the Action alleging that Defendants infringe Plaintiff's trademark rights. Defendants deny these allegations.

305. Absent a declaration that Plaintiff's Trademark Application Serial No. 86/174,797 for the mark THE NODE FIRM (the "YLD Application") is unregistrable; any common law rights of Plaintiff (if any) in the mark THE NODE FIRM are limited, on the basis that THE NODE FIRM mark is descriptive of the services provided by YLD thereunder or identified in the

YLD Application therefor; and Plaintiff has not established the requisite secondary meaning to support registration, Plaintiff will continue to wrongfully assert and pursue claims against Defendants.

306. The word NODE describes Node.js, which is an open source, cross-platform runtime environment for server-side and networking applications.

307. The word FIRM describes a type of business organization.

308. The mark THE NODE FIRM is merely descriptive under §2(e)(1) of the Trademark Act, as it describes a characteristic and purpose of the services recited in the YLD Application, namely, a business organization that performs computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; and creating of computer programs, in the Node programming language.

309. Because YLD has not established acquired distinctiveness of the mark THE NODE FIRM, and for the reasons stated above could not establish such acquired distinctiveness, YLD is not entitled to trademark protection for the mark THE NODE FIRM.

**THIRD COUNTERCLAIM AGAINST YLD**  
**Declaration of Noninfringement of Alleged Copyright Rights**

310. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-309 above as though fully set forth herein.

311. An actual and justiciable controversy exists between Defendants and Plaintiff with respect to Defendants' alleged reproduction, distribution, display, licensing or other exploitation of Plaintiff's Asserted Works because Plaintiff brought the Action alleging that Defendants infringe Plaintiff's alleged copyright rights in such Asserted Works. Defendants deny these allegations.

312. Absent a declaration of noninfringement of any alleged copyright rights of Plaintiff, Plaintiff will continue to wrongfully assert and pursue claims against Defendants.

313. Defendants have not infringed any valid and enforceable copyright rights asserted by Plaintiff in any manner, willfully or otherwise, either directly, vicariously, by inducing others to infringe, or by contributing to infringement, and Defendants are entitled to an affirmative declaration to that effect.

**FOURTH COUNTERCLAIM AGAINST YLD**  
**Declaration of Copyright Invalidity**

314. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-313 above as though fully set forth herein.

315. An actual and justiciable controversy exists between Defendants and Plaintiff with respect to Defendants' alleged reproduction, distribution, display, licensing or other exploitation of Plaintiff's Asserted Works because Plaintiff brought the Action alleging that Defendants infringe Plaintiff's alleged copyright rights in such Asserted Works. Defendants deny these allegations.

316. Defendants request an order declaring that the Asserted Registration is invalid and unenforceable for, *inter alia*, the following reasons:

- (a) The Asserted Works do not reflect the minimum degrees of creativity and originality required under the Copyright Act for a work to be entitled to copyright protection or registration; and/or
- (b) The Asserted Works consist of known elements, components and depictions, and compilations thereof, all of which are in the public domain, and are not entitled to copyright protection or registration; and/or
- (c) The Asserted Works consist of uncopyrightable facts, the selection, coordination, and arrangement of which are dictated by function; and/or
- (d) The deposit materials submitted in connection with the Asserted Registration are improper, as they do not accurately reflect, and are not

sufficient to protect, the Asserted Works claimed by Plaintiff to be covered by the Asserted Registration.

317. Absent a declaration that Plaintiff's Copyright Registration No. TX 7-877-084 is invalid, Plaintiff will continue to wrongfully assert and pursue claims against Defendants.

**FIFTH COUNTERCLAIM AND FIRST THIRD-PARTY CLAIM**  
**AGAINST YLD AND JOB**

**False Designation of Origin Under 15 U.S.C. § 1125**

318. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-317 above as though fully set forth herein.

319. Through use of the mark THE NODE FIRM since November 2011, first by the Informal Alliance and then by TNF, significant value and goodwill in the mark THE NODE FIRM became closely associated with TNF, Shaw, and McCann, and work performed by them or on their behalf.

320. YLD and/or Job's use of the mark THE NODE FIRM falsely represents or designates that services offered by YLD and/or Job are licensed by, sponsored by, originated with and/or otherwise affiliated with TNF or NodeSource (i.e. the successive ventures of Shaw and McCann), or falsely represents or designates that the source of such services offered by YLD and/or Job under the mark THE NODE FIRM are affiliated, connected, or associated with TNF or NodeSource.

321. YLD and/or Job's use of the mark THE NODE FIRM is likely to cause confusion or mistake, or to deceive relevant consumers as to the origin, sponsorship, association or approval of the services offered by YLD and/or Job, or to cause confusion or mistake, or to deceive relevant consumers that YLD and/or Job is affiliated, connected, or otherwise associated with TNF or NodeSource.

322. The acts of YLD and/or Job complained of herein have been without the authorization or consent of Defendants, and have damaged Defendants in an amount to be proven at trial.

323. The acts of YLD and/or Job complained of herein constitute a violation of 15 U.S.C. § 1125(a).

**SIXTH COUNTERCLAIM AND SECOND THIRD-PARTY CLAIM**  
**BY SHAW AND MCCANN AGAINST YLD AND JOB**  
**Defamation**

324. Defendants Shaw and McCann repeat and reallege each of their responses and allegations in Paragraphs 1-323 above as though fully set forth herein.

325. The contents of the July 14 Statements, in whole or in part, are false and defamatory, and constitute defamation *per se* in that they tend to injure Defendants Shaw and McCann with respect to their trade, business or profession.

326. The contents of the July 14 Statements, in whole or in part, were made wrongfully and maliciously, with the intent to cause harm to the reputations of Defendants Shaw and McCann.

327. Job, individually and/or on behalf of YLD, published the July 14 Statements to Duque without privilege or authorization.

328. As a result of the above actions of YLD and Job, Defendants Shaw and McCann have been damaged in an amount to be proven at trial.

**THIRD THIRD-PARTY CLAIM AGAINST JOB**  
**Trespass to Chattel**

329. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-328 above as though fully set forth herein.

330. Job's actions in terminating TNF's access to the TNF Website, and rerouting incoming TNF email and calendar requests, resulted in the unauthorized restriction of TNF and its employees to conduct operations.

331. At the time of Job's actions, the TNF Website and related accounts were the sole and exclusive property of TNF.

332. Job intentionally, maliciously, and without authorization interfered with TNF's use or possession of the TNF Website and related accounts.

333. Job's actions have caused injury to Defendants by depriving TNF, its employees and customers, of the ability to conduct their business, and by forcing Defendants to spend significant time and money resuming operations under a new business name, website and DNS server. Job's actions have also caused injury to Defendants' goodwill.

334. As a result of Job's unauthorized and intentional conduct, Defendants have been damaged in an amount to be proven at trial.

**FOURTH THIRD-PARTY CLAIM AGAINST JOB**  
**Conversion**

335. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-334 above as though fully set forth herein.

336. Job's actions in terminating TNF's access to the TNF Website and rerouting incoming TNF email and calendar requests resulted in the willful interference and conversion of Defendants' personal property, without lawful justification, as a result of which Defendants were deprived of possession and use of their property.

337. At the time of Job's actions, the TNF Website and related accounts were the sole and exclusive property of TNF.



338. As a result of Job's actions, Defendants have been damaged in an amount to be proven at trial.

**FIFTH THIRD-PARTY CLAIM AGAINST JOB**  
**Breach of Fiduciary Duty**

339. Defendants repeat and reallege each of their responses and allegations in Paragraphs 1-338 above as though fully set forth herein.

340. Through Job's actions and statements, Job encouraged and induced Defendants to repose trust in Job with respect to the operations of TNF.

341. By virtue of Job's actions and statements, as well as the prior business relationship between Defendants and Job, Defendants were in a position of trust and confidence as to Job, and Job reposed trust and confidence in Defendants.

342. The facts set forth in the foregoing allegations imposed upon Job fiduciary duties of care, loyalty, candor, trust, and good faith with respect to Defendants.

343. Job knowingly and willfully breached his fiduciary duties to Defendants when he unlawfully terminated TNF's access to the TNF Website, email and calendar requests, and disseminated false and defamatory statements regarding Defendants.

344. As a result of Job's actions, Defendants have been damaged in an amount to be proven at trial.

**JURY DEMAND**

Defendants hereby demand a jury trial of all issues triable by jury in the claims, counterclaims and third-party claims.

**RELIEF**

WHEREFORE, Defendants request: (i) an entry of judgment against Plaintiff dismissing the Amended Complaint and all claims asserted therein with prejudice; (ii) a declaration that

Defendants have not infringed any trademark or copyright rights of Plaintiff, and that any purported trademark or copyright rights of Plaintiff are invalid; (iii) an entry of judgment in favor of Defendants on all the remaining counterclaims and third-party claims; (iv) an award of compensatory, consequential, statutory and punitive damages sustained by Defendants in an amount to be determined at trial; (v) an award to Defendants of attorney fees, costs and expenses of litigation incurred herein; and (vi) a grant to Defendants of such other and further relief as the Court may deem just and proper under the circumstances.

Dated: August 31, 2015

RESPECTFULLY SUBMITTED,

By: s/Erica D. Klein

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